2008-0851-MIS-U

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July 31, 2012

VIA Hand Delivery

Bridget C. Bohac, Chief Clerk
Texas Commission on Environmental Quality
12100 Park 35 Circle
Building F, 1st Floor
Austin, Texas 78753

RE: CER-Colorado Bend Energy LLC. (formerly known as Navasota Wharton Energy Partners, L.P.) - Appeal of July 10, 2012 Negative Use Determination

Dear Ms. Bohac:

We are in receipt of the Executive Director's letter dated July 10, 2012 notifying the Applicant of a negative use determination (the "***Determination***") on its application #07-11926 (the "***Application***")

I. Procedures For Appeal

Applicant disagrees with the Determination and pursuant to 30 TAC 17.25 hereby provides:

(1) the name, address, and daytime telephone number of the person filing the appeal is:

Mike Nasi
Jackson Walker L.L.P.
100 Congress Ave., Ste. 1100
Austin, Texas 78701
512-236-2216

As legal counsel to:
CER-Colorado Bend Energy LLC
Attn: Barbara A. Cherry
Assistant General Counsel
100 Constellation Way, Suite 1700P
Baltimore, MD 21202

(2) the name and address of the entity to which the use determination was issued:

CER-Colorado Bend Energy LLC.[1]
Attn: Barbara A. Cherry
Assistant General Counsel
100 Constellation Way, Suite 1700P
Baltimore, MD 21202

(3) the use determination application number for the Application was:

07-11926

(4) request Commission consideration of the use determination:

Applicant hereby requests the Commission to hear and consider the merits of the Application and reach a determination that a negative use determination is not appropriate and the matter should be remanded back to the Executive Director for a determination that the property in question is eligible for a positive use determination.

(5) The basis for the appeal is set forth in full in the attached brief.

Sincerely,

for Michael J. Nasi, Counsel for
CER-Colorado Bend Energy LLC

[1] CER-Colorado Bend Energy LLC. was formerly known as Navasota Wharton Energy Partners, L.P. The legal entity and project owner has remained in existence during all relevant time periods, and underwent a ministerial name change by filing an Amendment to Registration with the Texas Secretary of State on July 23, 2010.

TCEQ DOCKET NO. _____

APPEAL OF NEGATIVE USE	§	**TEXAS COMMISSION**
	§	
DETERMINATION ISSUED TO	§	
	§	**ON**
NAVASOTA WHARTON ENERGY	§	
PARTNERS LP (UD 07-11926)	§	**ENVIRONMENTAL QUALITY**

APPEAL OF NEGATIVE USE DETERMINATION ISSUED TO
CERT-COLORADO BEND ENERGY LLC

CER-Colorado Bend Energy LLC (formerly known as Navasota Wharton Energy Partners LP ("***Applicant***" or ***"Colorado Bend"***) files this appeal of the negative use determination issued by the Executive Director on July 10, 2012. For the reasons articulated below, the Applicant respectfully requests that the Commission sustain the Applicant's appeal of the negative use determination and remand the matter to the Executive Director for a determination that the property in question is eligible for a positive use determination.

Following a brief summary of argument, Part II of this brief provides a brief background of the Pollution Control Property Program; Part III describes the procedural background of the application and subsequent appeal; Parts IV-VI details the Applicant's argument why the negative use determination is a misapplication of Texas law, is based on policy concerns outside of the Agency's purview, and is founded on a defective technical evaluation, as well as why the General Counsel's remand of the original use determination was not legal under the applicable provisions of the Texas Tax Code.

Summary of Argument

This is an appeal of a negative use determination. Therefore, quite simply, the only question before the Texas Commission on Environmental Quality (***"TCEQ"***) in considering this appeal is not whether an exact percentage is appropriate - the Commissioners need only evaluate whether any percentage above zero is appropriate. As set forth fully herein, applicable law, prior precedent, and the record in this case demand that a number above zero be used and a positive use determination be issued. Thus, this appeal should be granted and this matter should be remanded back to the Executive Director for a determination that the property in question is eligible for a positive use determination.

I. Program Background

On November 2, 1993, Texans approved Proposition 2 amending the Texas Constitution to provide tax relief for pollution control property. This amendment added §1-1 to the Texas Constitution, Article VIII, which states:

> (a) The legislature by general law may exempt from ad valorem taxation all or part of real and personal property used, constructed, acquired, or installed wholly or partly to meet or exceed rules or regulations adopted by any environmental protection agency of the United States, this state, or a political subdivision of this state for the prevention, monitoring, control, or reduction of air, water, or land pollution.
>
> (b) This section applies to real and personal property used as a facility, device, or method for the control of air, water, or land pollution that would otherwise be taxable for the first time on or after January 1, 1994.

In response to the constitutional amendment, the Texas Legislature added Texas Tax Code, §11.31, Pollution Control Property ("***§11.31***" or "***Section 11.31***"). The statute establishes a process where applicants submit Applications for Use Determination to the Executive Director of the TCEQ to determine whether the property is used wholly or in part for pollution control.[2] The Executive Director's role is limited by §11.31 to the specific task of conducting a technical evaluation to determine whether the equipment is used wholly or partly for the control of air, water, or land pollution,[3] and does not include any evaluation of the merit of the tax exemption itself or tax policy implications of granting positive or negative use determinations.

The tax appraisal district where the Pollution Control Property will be installed/constructed is the entity charged with actually granting the tax exemption. If an applicant obtains a positive use determination from the Executive Director, the applicant must then submit another application with the local appraisal district to receive the tax exemption for the pollution control property.

In 2001, the Legislature passed House Bill 3121, which amended §11.31. These amendments included providing a process for appealing the Executive Director's use determinations.[4] House Bill 3121 also required the Commission to adopt rules that establish

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[2] TEX. TAX CODE § 11.31(c) and (d).

[3] TEX. TAX CODE § 11.31(c).

[4] TEX. TAX CODE § 11.31(e).

specific standards for the review of applications that ensure determinations are equal and uniform,[5] and to adopt rules to distinguish the proportion of property that is used to control pollution from the proportion that is used to produce goods or services.[6]

In 2007, §11.31 was amended again with the passage of House Bill 3732, which required the Commission to adopt a list of equipment that is considered pollution control property, including the equipment listed in §11.31(k). In adopting rules for the implementation of House Bill 3732, the TCEQ created a Tier IV application for the categories of listed equipment. For Tier IV applications, the Executive Director must determine the proportion of the equipment used for pollution control and the proportion that is used for production. The application that is the subject of this appeal is a Tier IV application.

II. Procedural Background

On March 19, 2008, the Applicant filed a Tier IV Application for Use Determination for Pollution Control Property with the Executive Director for four Heat Recovery Steam Generators ("HRSGs") and two steam turbines (the "Steam Turbines"). (See Attachment A). The Executive Director conducted a technical review of the application and on May 1, 2008 issued a 100 percent positive use determination for the four HRSGs, stating that "[t]his equipment is considered to be pollution control equipment and was installed to meet or exceed federal or state regulations." (See Attachment B). The Executive Director also determined that the two steam turbines were not pollution control property and issued a negative determination for those facilities. Subsequently, on May 19, 2008, Wharton County Appraisal District filed an appeal of the Executive Director's use determination, claiming that the HRSGs "are production equipment in that they burn natural gas to create steam to generate electricity." (See Attachment C).

The Executive Director has received approximately thirty-eight similar applications for HRSGs and steam turbines installed at combined-cycle electric generation facilities. The Executive Director issued 100 percent positive use determinations for twenty-six of the HRSG applications. Of the twenty-six positive use determinations, six were appealed by appraisal districts. In light of the six appealed positive use determinations, the Executive Director held a Workgroup to develop a uniform use determination percentage for HRSGs. As a result of that Workgroup, on December 3, 2008, the Executive Director submitted its Response Brief to the various appraisal district appeals of the Executive Director's positive use determinations, in which it recommended that the Commission lower the positive use determinations for the six appealed HRSG applications from 100 percent to 61 percent. (See Attachment D).

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[5] TEX. TAX CODE § 11.31(g)(1) and (g)(2).

[6] TEX. TAX CODE § 11.31(g)(3).

The appeal of the Executive Director's positive use determination for the Applicant and the five other similarly situated applicants was scheduled to appear on the Commission's Agenda to be held on February 25, 2009. However, on February 23, 2009, two days prior to the Agenda, the Executive Director filed with the TCEQ's General Counsel a Motion for Continuance to "allow the Executive Director more time to evaluate its current recommendation." (See Attachment E) In response to the Executive Director's motion, the General Counsel chose to continue the matter "indefinitely." (See Attachment F).

On June 18, 2012, almost three and a half years after the Commission indefinitely continued the matter on its Agenda, the Executive Director requested that the General Counsel remand the six appealed used determinations back to the Executive Director for "further processing" (See Attachment G). On June 29, 2012, before the Commission ever made a final determination on the original appeal of the positive use determination, the General Counsel remanded the matter back to the Executive Director.[7] (See Attachment H). In less than two weeks, on July 10, 2012, the Executive Director issued a new use determination, stating that "[h]eat recovery steam generators are used solely for production and, therefore, are not eligible for a positive use determination." (See Attachment J).

III. Procedural Error

Applicant has concurrently filed along with this appeal a Request for Reversal of the June 29, 2012 remand issued by the Texas Commission on Environmental Quality (***"TCEQ"***) General Counsel in TCEQ Docket No. 2008-0851-MIS-U regarding the positive use determination issued by the Executive Director to the Applicant on May 1, 2008. Because the procedural errors complained of in this appeal include the impermissible remand of the prior positive use determination, this appeal adopts all of arguments contained in the Request for Reversal as if they were set forth fully herein.

In 2007, the Texas Legislature passed House Bill 3732, which amended Texas tax Code §11.31. Specifically, House Bill 3732 added subsections (k) and (m). Subsections 11.31(k) and (m) direct that the Commission "shall determine" that "heat recovery steam generators" are "used wholly or partly" as qualifying pollution control property. There is no option under the statute for TCEQ to determine that equipment listed in 11.31(k) is not pollution control equipment. When the Legislature added subsection 11.31(k) in 2007, the purpose was to list equipment that was predetermined to be pollution control equipment and the only evaluation that needed to occur was to determine the percentage of the equipment that qualified as pollution

[7] Applicant has submitted a separate request to reverse the General Counsel's remand of the use determination, which is included as Attachment I. The arguments made by Applicant in the request to reverse the remand are hereby incorporated by reference.

control property. The question is not "whether the equipment is pollution control property", but instead should be "how much is pollution control property."

Furthermore, under Texas Tax Code §11.31(m), the Executive Director "shall" review applications for equipment listed under §11.31(k) and make a determination whether the equipment is wholly or partly pollution control property within 30 days. Furthermore, the statute states that the Executive Director "shall" take action on that determination and notify the applicant and the appraisal district of the determination. Thus, the Executive Director must review and issue a use determination within 30 days for those applications which were submitted after House Bill 3732 became effective, and which include equipment that is listed under Texas tax Code §11.31(k).

As indicated earlier, the Executive Director received Colorado Bend's application on March 19, 2008. Despite the statute's clear requirement that the Executive Director act within 30 days on applications for equipment listed under §11.31(k), in this instance, the Executive Director waited over four years from the time the application was submitted to make a determination. By failing to act within 30 days, the Executive Director violated the statutory requirements of Texas Tax Code §11.31(m) and effectively prevented the Applicant from receiving a tax exemption for which it met all of the statutory requirements.

IV. Texas Tax Code Requires Consistency

a) The Executive Director's Use Determination Violates the Equal and Uniform Tax Mandate in Texas Constitution art. VIII, Section 1(a).

In Texas, all taxation must be equal and uniform.[8] The Texas Constitution's equal and uniform standard is strikingly incorporated into Section 11.31:

> "(d) The commission shall adopt rules to implement this section. Rules adopted under this section must . . . (2) be sufficiently specific ***to ensure that determinations are equal and uniform*** . . ."

The constitutional mandate requires that a tax must treat taxpayers within the same class alike, and that any classifications must not be unreasonable, arbitrary, or capricious.[9] The

[8] Tex. Const. art. VIII, Section 1(a). The Article VIII, Section 1 of the Texas Constitution provides: "(a) Taxation shall be equal and uniform. (b) All real property and tangible personal property in this State, unless exempt as required or permitted by this Constitution, whether owned by natural persons or corporations, other than municipal, shall be taxed in proportion to its value, which shall be ascertained as may be provided by law."

[9] *Hurt v. Cooper,* 110 S.W.2d 896, 901 (Tex. 1937).

standard for determining equal and uniform taxation is a two-part test: "(1) whether the tax's classification is reasonable; and (2) whether, within the class, the legislation ***operates equally***."[10]

A tax cannot satisfy the second prong of the equal and uniform standard unless the value of the tax base is ascertained by the same standard for all taxpayers within each class.[11] ("The standard of uniformity prescribed by the Constitution being the value of property, taxation can not be in the same proportion to the value of the property, unless the value of all property is ascertained by the same standard."). In other words, when taxing value (i.e., the tax base), the Legislature may not say that the same economic value is more for some taxpayers than it is for other taxpayers.

In the instant case the Commission has granted 100 percent exemption for heat recovery steam generator systems that are substantively identical to Applicant's to approximately 20 other taxpayers. There has been no reasoned justification for the distinction based on any alleged differences in design or use or location of the equipment. The negative use determination made against Applicant is arbitrary in that there is no substantive distinction between the use or pollution reducing benefit of the HRSGS and the Steam Turbines and the multiple other applicants whose systems have been granted 100 percent positive use determinations by the Commission. Such random enforcement causes §11.31 to operate unequally and in direct violation of the equal and uniform tax mandate.

b) The Commission Does Not Have Authority to Make a Negative Use Determination Under Section 11.31 of the Texas Tax Code

Subsections 11.31(k) and (m) direct that the Commission "*shall determine*" that "heat recovery steam generators" and "enhanced steam turbine systems" are "used wholly or partly" as qualifying pollution control property.[12]

The Determination's negative use finding is facially and patently in violation of the Texas Tax Code.

The Application requested a 100 percent positive use determination that the Applicant's four HRSGS and two Steam Turbines were used in accordance with the following statutory standard set forth in Section 11.31[13] of the Texas Tax Code:

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[10] *R.R. Comm 'n of Tex. v. Channel Indus. Gas,* 775 S.W.2d 503, 507 (Tex. App.—Austin 1989, writ denied) (*emphasis added*).

[11] *Lively v. Missouri, K. & T. Ry.,* 120 S.W. 852, 856 (Tex. 1909).

[12] Tex. Tax Code Section 11.31(k) & (m).

> "A person is entitled to an exemption from taxation of all or part of real and personal property that the person owns and that is used ***wholly or partly as a facility, device, or method for the control of air, water, or land pollution***."
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> In this section, "facility, device, or method for the control of air, water, or land pollution" means land that is acquired after January 1, 1994, or any structure, building, installation, excavation, machinery, equipment, or device, and any attachment or addition to or reconstruction, replacement, or improvement of that property, that is used, constructed, acquired, or installed ***wholly or partly to meet or exceed rules or regulations adopted by any environmental protection agency of the United States, this state, or a political subdivision of this state for the prevention, monitoring, control, or reduction of air, water, or land pollution.***"

The Application and Attachment K attached hereto establish the factual basis that the HRSGS and the Steam Turbines qualify as a ***device, or method for the control of pollution.***

Despite the clear factual record that the HRSGS and Steam Turbines control pollution, the Determination summarily finds, without explanation or substantive reasoning, that the HRSGS and Steam Turbines will be subject to a negative use determination because they are "used solely for production." The facts do not support the Determination, and there is no reasonable interpretation of Section 11.31 that would support the Determination.

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[13] Section 11.31 of the Texas Tax Code is authorized by Article VIII, Section l-1 of the Texas Constitution, which provides: "(a) The legislature by general law may exempt from ad valorem taxation all or part of real and personal property used, constructed, acquired, or installed wholly or partly to meet or exceed rules or regulations adopted by any environmental protection agency of the United States, this state, or a political subdivision of this state for the prevention, monitoring, control, or reduction of air, water, or land pollution. (b) This section applies to real and personal property used as a facility, device, or method for the control of air, water, or land pollution that would otherwise be taxable for the first time on or after January 1, 1994. . . . (Added Nov. 2, 1993.)"

Section 11.31 must be construed to give effect to the Legislature's intent.[14] An agency or court should first attempt to determine this intent from the actual language used by the Legislature. That is, an agency or court should first look to the plain, ordinary meaning of the statute's words.[15] Most importantly, "[i]f a statute is clear and unambiguous, [the courts] apply its words according to their common meaning without resort to rules of construction or extrinsic aids."[16] This is true even when the agency charged with enforcing the statute seeks to apply a different construction.[17]

Further, Texas Attorney General Opinion JC-0372 (2001) has expressly opined to the Chair of the Texas Natural Resource Conservation Commission that "methods of production" can and do qualify as exempt pollution control property:

> "Section 11.31 is ***broadly written, and we believe its plain meaning is clear***. It embraces any property, real or personal, "that is used wholly or partly as a facility, device, or method for the control of air, water or land pollution. . . ." (*emphasis added*).
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> "Next, we consider whether section 11.31 excludes from its scope pollution-reducing ***production*** equipment. Significantly, the statute applies to property used "wholly or partly" for pollution control. See id. § 11.31(a). To qualify for the exemption, property must be used "wholly or partly" to meet or exceed environmental rules. See id. § 11.31(b). The term "wholly" clearly refers to property that is used only for pollution control, such as an add-on device. See Merriam Webster's Collegiate Dictionary 1351 (10th ed. 1993) (defining "wholly" to mean "to the full or entire extent: ... to the exclusion of other things"). ***The term "partly," however, embraces property that has only some pollution-control use***. See id. at 848 (defining "partly" to mean "in some measure or degree"). This broad formulation clearly embraces more than just add-on devices. ***Furthermore, that statute clearly embraces not only "facilities" and "devices" but also "methods" that prevent, monitor, control, or reduce pollution. "Methods" is an extremely broad term that clearly embraces means of production designed, at least in part,***

[14] *See* TEX. GOV'T CODE § 312.005; *Gilbert v. El Paso County Hosp. Dist.*, 38 S.W.3d 85 (Tex. 2001).

[15] *See* TEX. GOV'T CODE § 312.002(a); *Am. Home Prods. Corp. v. Clark*, 38 S.W.3d 92, 95-96 (Tex. 2000); *Crimmins v. Lowry*, 691 S.W.2d 582, 584 (Tex. 1985).

[16] *See In Re Nash*, 220 S.W.3d 914, 917 (Tex. 2007) (emphasis added).

[17] *See Pretzer v. Motor Vehicle Bd.*, 138 S.W.3d 908, 914-15 (Tex. 2004); *Barchus v. State Farm Fire & Cas. Co.*, 167 S.W.3d 575, 578 (Tex. App.—Houston [14th Dist.] 2005, pet denied).

to reduce pollution. See id. at 732 (defining "method" to include "a way, technique, or process of or for doing something").

The HRSGS and Steam Turbines are clearly used to comply with environmental laws and to control pollution and qualify for exemption under any valid rule or convention of statutory construction.

c) Failure To Comply With Commission Rules and the Texas Administrative Procedures Act.

The Commission cannot arbitrarily and capriciously create and enforce a new internally derived formula for heat recovery steam generators resulting in a drastic increase in the amount of property taxes assessed against Applicant, without, at the very least,[18] adhering to the Texas Administrative Procedure Act (the "APA").

In brief, the APA requires state agencies to follow certain formal procedures before adopting and applying any "rule."[19] Among other requirements, the APA requires state agencies to provide notice of any intent to promulgate a new rule, to publish the contemplated new rule, and to invite public comment with respect to the new rule.[20] As the Texas Supreme Court explained: "In this way, the APA assures that the public and affected persons are heard on matters that affect them and receive notice of new rules."[21]

In addition to the APA requirements regarding the procedures that must be applied by state agencies when adopting and applying any "rule," Texas courts frequently require that an agency explain its reasoning when it "appears to the reviewing court that an agency has departed from its earlier administrative policy or there exists an apparent inconsistency in agency determinations." By issuing a 100 percent use determination and ultimately issuing a negative use determination, the TCEQ Executive Director's staff has departed from its earlier policy with regard to the evaluation of HRSGs. Furthermore, as explained earlier, TCEQ has issued 100 percent use determinations for other HRSGs, but issued negative use determinations for those applications that were appealed. In doing so, the TCEQ provided a one sentence explanation

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[18] And subject to the statutory arguments set forth below.

[19] The APA defines the term "rule" to mean "a state agency statement of general applicability that... implements, interprets, or prescribes law or policy." Tex. Gov't Code § 2001.003(6).

[20] *See Rodriguez v. Service Lloyds Ins. Co.*, 997 S.W.2d 248, 255 (Tex. 1999), *reh'g of cause overruled* (Sept. 9, 1999); *see also* Tex. Gov't Code § 2001.004(2) (additionally requiring agencies to "index, cross-index to statute, and make available for public inspection all rules and other written statements of policy or interpretations that are prepared, adopted, or used by the agency in discharging its functions").

[21] *Id.*

stating, "[HRSGs] are used solely for production and, therefore, are not eligible for a positive use determination."

In this case the Commission clearly failed to follow the procedures of the Texas APA in reaching and applying its interpretation of Section 11.31(k) and (m) of the Texas Tax Code. Because the Commission failed to promulgate any rule or other formal statement expressing its new interpretation of Section 11.31(k) and (m) of the Texas Tax Code, its interpretation violates the APA and must be disregarded.

Further, the Determination appears to represent a sea change in the Commission's interpretation of Section 11.31 without any change to its Section 11.31 rules. The Commission's attempt to make a material change in policy retroactively without compliance with the APA is an invalid rule under the APA under the analysis in *El Paso Hospital District v. Texas Health and Human Services Commission*, 247 S.W.3d 709 (Tex. 2008).[22]

In *El Paso Hospital District,* the Texas Health and Human Services Commission ("HHSC") adopted a regulation that established a "base year" for gathering claims data to be used in setting certain Medicaid hospital payment rates. Several hospitals sought a declaratory judgment that the cutoff rule was invalid under the APA, because HHSC did not adopt the rule in accordance with the APA. HHSC argued that the cutoff date was not a rule itself but rather an interpretation of a rule. The Texas Supreme Court held that the agency-applied cutoff date was an invalid rule because the agency did not follow the proper rule-making procedures contained in the APA. The Texas Supreme Court stated:

> "HHSC argues that it complied with these statutes, and that the February 28 cutoff is not a rule itself, but rather its interpretation of the base-year rule. The Hospitals disagree, arguing the February 28 cutoff falls squarely within the APA's definition of a rule. We agree with the Hospitals. Under the APA, a rule: (1) is an agency statement of general applicability that either "implements, interprets, or prescribes law or policy" or describes [HHSC'S] "procedure or practice requirements;" (2) "includes the amendment or repeal of a prior rule;" and (3) "does not include a statement regarding only the internal management or organization of a state agency and not affecting private rights or procedures." TEX. GOV'T CODE §2001.003(6)(A)-(C). *El Paso Hospital District* at 714.

[22] *El Paso Hospital District v. Texas Health and Human Services Commission*, 247 S.W.3d 709 (Tex. 2008).

The Commission's new internal formula or reasoning that resulted in the Determination interprets or prescribes law or policy and amends or repeals positions previously applied by the Commission.

The violation of APA requirements is especially egregious in this case given that Section 11.31(l) of the Texas Tax code mandates that the TCEQ, "by rule shall update the list adopted under Subsection (k)" and then makes clear that "[a]n item may be removed from the list if the commission finds compelling evidence to support the conclusion that the time does not provide pollution control benefits." No APA rulemaking procedure has been followed to remove HRSGS or enhanced steam turbine systems from Section 11.31(k) and it is inconceivable how the TCEQ could find that "compelling evidence exists to support the conclusion that [HRSGs] do not provide pollution control benefits."

V. The Record Supports a Positive Use Determination and Clearly Contradicts a Negative Use Determination

a) Pollution Control Property

The Facility's HRSGs can be defined as pollution control property based on the prevention of NOx emissions from natural gas use efficiencies. In fact, the Executive Director already did so. The Executive Director conducted a technical review of the application and on May 1, 2008 issued a 100 percent positive use determination for the four HRSGs, stating that "[t]his equipment is considered to be pollution control equipment and was installed to meet or exceed federal or state regulations." However, the Executive Director has since reversed course, which is the subject of this appeal.

Under Tax Code §11.31(a), "[a] person is entitled to an exemption from taxation of all or part of real and personal property that the person owns and that is used wholly or partly as a **facility**, device, **or method** for the control of air, water, or land pollution." (emphasis added). The statute defines "a facility, device, or method for the control of air, water, or land pollution" as:

> "[a] structure, building, installation excavation, machinery, equipment or device, and any attachment or addition to or reconstruction, replacement or improvement of that property, that is used, constructed, acquired, or installed wholly or partly to meet or exceed rules or regulations adopted by any environmental protection agency of the United States, this state, or a political subdivision of this state for the prevention, monitoring, control, or reduction of air, water, or land pollution."

Thus to qualify as pollution control property, the equipment or structure must control pollution and must meet or exceed applicable environmental protection regulations.

b) Method of Pollution Control

The use of otherwise wasted heat in the turbine exhaust gas within the HRSG results in higher plant thermal efficiency (net power output of the plant divided by the heating value of the fuel), compared to other power generation technologies. A plant incorporating a combined cycle design emits less NO_x per pound of fossil fuel combusted due to the incorporation of both the Brayton and Rankine Thermodynamic cycles within plant design operations

Specifically, the equipment's increased thermal efficiency, as compared to a traditional steam boiler unit, reduces the fuel needs for the same power outputs, while emitting no additional air emissions. It is important to note that the lower fuel consumption associated with increased fuel conversion efficiency not only reduces NOx emissions, but also reduces emissions of hazardous air pollutants and greenhouse gas emissions such as CO_2.

c) HRSGs are Used to Meet Certain New Source Performance Standards for Electric Generating Facilities

As cited in the Application, Title 40 of the Code of Federal Regulations ("CFR") subpart 60.44Da establishes New Source Performance Standards ("NSPS") for emissions of air contaminants for electric utility steam generating facilities.

Subpart §60.40Da(e)(1) specifically lists HRSGs as subject to the NSPS requirements in 60.44Da, stating:

> (i.e. heat recovery steam generators used with duct burners) associated with a stationary combustion turbine that are capable of combusting more that 73 MW (250MMBtu/H) heat input of fossil fuel are subject to this subpart except in cases when the affected facility (i.e. heat recovery steam generator) meets the applicability requirements of and is subject to subpart KKKK of this part..

Therefore, Applicant's four HRSGs are subject to the performance standards for air emissions as established within the Subpart Da. Specifically, they are subject to Section 60.44Da Standards for nitrogen oxides which states:

> Except as provided in paragraph (h) of this section, on and after the date on which the initial performance test is completed or required to be completed...no owner or operator subject to the provisions of

> this subpart shall cause to be discharged into the atmosphere from any affected facility for which construction...commenced before July 10, 1997 any gases that contain NO_x (expressed as NO2) in excess of the applicable emissions limit in paragraphs (a)(1) and (2) of this section.

Furthermore, the Applicant's HRSGs were designed to meet the national primary and secondary ambient air quality standards ("NAAQS") for oxides of nitrogen (with nitrogen dioxide as the indicator) as set forth in 40 CFR §50.11.

d) Evaluation of Output Based Emissions is An Appropriate Measure of Pollution Control

A 100 percent exemption position presented under the Thermal Efficiency/Output Based Emissions argument, which calculates a measure of air emissions avoidance, and applies this measure against capital costs to establish a percentage exemption for the HRSGs, is the most appropriate way to characterize the pollution prevention function of the Applicant's HRSGs.

In an Output-based NO_x allocation method the baseline or comparison plant used in the Output Based Model is a conventional, gas fired boiler. It was chosen for fuel type application and heat rate considerations. Both the U.S. Environmental Protection Agency ("EPA") and other states recognize the use of energy efficiency as a measure of pollution control and/or pollution prevention with some states using this method as part of their tax exemption programs.

Monitoring data from the Barney Davis Power Plant during both pre and post-repowering of that plant confirm the assumptions regarding the air emissions reductions per pound of fossil fuel use. This data is set out in Attachment K.

VI. TCEQ's Role as a Technical Advisor to the State in Administering the Prop 2 Program Includes Factoring in Ever-Evolving Pollution Control Policies, not Tax Policy

The clear structure and purpose of Section 11.31 of the Texas Tax Code has for nearly two decades been for the TCEQ to serve as the scientific and technical arbiter for determining the types of equipment that qualify as pollution control property. The TCEQ's role has always been to implement an efficient, consistent and scientifically accurate process to determine technologies that meet the statutory definition of pollution control property. Section 11.31 directs the TCEQ to determine whether particular items of property are used for pollution control based on its specialized knowledge and expertise.

Section 11.31 creates clear and separate roles for: (i) the TCEQ, as the technical expert on pollution control property; and (ii) the appraisal districts whose job it is to value property.

The TCEQ's role does not involve local tax administration or local budgetary issues. The specter of prejudice to a local tax base by appraisal districts based on the unfounded argument that HRSGs and Steam Turbines are production equipment is a thinly veiled argument that is outside of the TCEQ's role, and that potentially leads to double taxation of the residual, non-pollution control portion, of the plant, which is routinely valued, at least in part, on an income basis.[23]

The Commission's role is not to evaluate the tax policy and budget impacts of tax exemption decisions. Now that output-based emission limits are the law of the Land, whether talking about conventional pollutants such as NOx, or newly-implemented rules regarding Greenhouse Gases ("GHGs"), the Commission's technical evaluations must evolve along with those standards.

Gone are the days when the Commission need only confirm the pollution control characteristics of bolt-on pollution control devices. The Commission now has the much more complicated job of developing a consistent approach for calculating the pollution control aspects of "devices and methods" that also have productive value. The pending HRSGs appeals are an early indicator of that evolving role.

Whether or not the Commission chooses to stay with its initial approach of granting 100% exemptions to HRSGs, it must develop a consistent methodology that embraces the reality that HRSGs and similar technologies are, in many instances, the only (or at least most sensible) way for fossil fuel-fired power generation to be built in compliance with new output-based emission limits.

Conclusion

As noted at the outset of this brief, the question before the Commission in considering this appeal is not whether an exact percentage is appropriate - the Commissioners need only evaluate whether any percentage above zero is appropriate. As set forth fully above, applicable law, prior precedent, and the record in this case demand that a positive use determination be issued. Thus, this appeal should be granted and this matter should be remanded back to the Executive Director for a determination that the property in question is eligible for a positive use determination.

[23] *See* e.g., Tex. Tax Code Section 23.0101.

Respectfully submitted,

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Steve Moore
State Bar No. 14377320
Benjamin Rhem
State Bar No. 24065967

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ATTORNEYS FOR
CER-COLORADO BEND ENERGY LLC

CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of July, 2012, a copy of the foregoing was provided by electronic mail or U.S. First Class Mail to the attached mailing list:

for Michael J. Nasi

Mailing List

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Attachment A

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
APPLICATION FOR USE DETERMINATION
FOR POLLUTION CONTROL PROPERTY

The TCEQ has the responsibility to determine whether a property is a pollution control property. A person seeking a use determination for pollution control property must complete the attached application or use a copy or similar reproduction. For assistance in completing this form refer to the TCEQ guidelines document, *Property Tax Exemptions for Pollution Control Property*, as well as 30 TAC §17, rules governing this program. For additional assistance please contact the Tax Relief for Pollution Control Property Program at (512) 239-3100. The application should be completed and mailed, along with a complete copy and appropriate fee, to: TCEQ MC-214, Cashiers Office, P.O. Box 13088, Austin, Texas 78711-3088.

1. GENERAL INFORMATION

A. What is the type of ownership of this facility?

- ☐ Corporation
- ☐ Partnership
- ☑ Limited Partnership
- ☐ Sole Proprietor
- ☐ Utility
- ☐ Other

B. Size of company: Number of Employees

- ☑ 1 to 99
- ☐ 100 to 499
- ☐ 500 to 999
- ☐ 1,000 to 1,999
- ☐ 2,000 to 4,999
- ☐ 5,000 or more

C. Business Description: **Electricity Manufacturing (SIC 4911)**

2. TYPE OF APPLICATION

- ☐ **Tier I $150 Application Fee**
- ☐ **Tier II $1,000 Application Fee**
- ☐ **Tier III $2,500 Application Fee**
- ☑ **Tier IV $500 Application Fee**

NOTE: Enclose a check, money order to the TCEQ, or a copy of the ePay receipt along with the applicaton to cover the required fee.

3. NAME OF APPLICANT

A. Company Name: Navasota Wharton Energy Partners LP

B. Mailing Address (Street or P.O. Box): 403 Corporate Woods

C. City, State, ZIP: Magnolia, TX 77354

4. PHYSICAL LOCATION OF PROPERTY REQUESTING A TAX EXEMPTION

A. Name of facility: Colorado Bend

B. Type of Mfg Process or Service: Electricity Manufacturing (SIC 4911)

C. Street Address: 3821 S. State Hwy 60

D. City, State, ZIP: Wharton, TX 77488

E. Tracking Number Assigned by Applicant: DPCOBend B

F. Customer Number or Regulated Entity Number: N/A

5. APPRAISAL DISTRICT WITH TAXING AUTHORITY OVER PROPERTY

A. Name of Appraisal District: Wharton

B. Appraisal District Account Number: 10258-000-000-00; 10-20500000-0200-67099; 20063-000-055-00

Replacement
~~07-12209~~ 07-11926

6. CONTACT NAME (must be provided)

A. Company/Organization Name:	Duff and Phelps LLC
B. Name of Individual to Contact:	Greg Maxim
C. Mailing Address:	919 Congress Ave. Suite 1450
D. City, State, ZIP:	Austin, TX 78701
E. Telephone number and fax number:	(512) 671-5580 Fax (512) 671-5501
F. E-Mail address (if available):	gregory.maxim@duffandphelps.com

7. RELEVANT RULE, REGULATION, OR STATUTORY PROVISION

Please reference Section 8. Each item is detailed with the proper statute, regulation, or environmental regulatory provision.

8. DESCRIPTION OF PROPERTY

Background

The Colorado Bend Energy Center (the "Facility"), owned by Navasota Wharton Energy Partners LP, is a combined cycle natural-gas fired power plant located in Wharton, Wharton County, Texas. The Facility is intended to have a total capacity of 825 Mw, built in three phases. Phase has a capacity of 275 Mw and was completed in June of 2007. Phase 2, currently under construction, is to be completed in June of 2008 and will also have a 275 Mw capacity. Each phase consists of 2 GE 7-EA combustion turbine units utilizing the GE Dry Low NOx combustion control system technology, 2 heat recovery steam generating (HRSG) units, and one steam turbine unit. The Facility utilizes a cooling tower within the circulating water system for condenser cooling water needs and condensate return purposes.

Overview of Combined Cycle Technology

The Facility consists of a combined-cycle gas turbine power plant with gas Combustion Turbines ("CTs") equipped with heat recovery steam generators to capture heat from the gas turbine exhaust. Steam produced in the heat recovery steam generators powers a steam turbine generator(s) to produce additional electric power. Use of the otherwise wasted heat in the turbine exhaust gas results in higher plant thermal efficiency compared to other combustion technologies. Combined-cycle plants currently entering service can convert approximately 50% of the chemical energy of natural gas into electricity (HHV basis).

The Rankine cycle is a thermodynamic cycle that converts heat from an external source into work. In a Rankine cycle, external heat from an outside source is provided to a fluid in a closed-loop system. This fluid, once pressurized, converts the heat into work output using a turbine. The fluid most often used in a Rankine cycle is water (steam) due to its favorable properties, such as nontoxic and unreactive chemistry, abundance, and low cost, as well as its thermodynamic properties. The thermal efficiency of a Rankine cycle is usually limited by the working fluid. Without pressure reaching super critical the temperature range the

Rankine cycle can operate over is quite small, turbine entry temperatures are typically 565°C (the creep limit of stainless steel) and condenser temperatures are around 30°C. This gives a theoretical Carnot efficiency of around 63% compared with an actual efficiency of 42% for a modern coal-fired power station. This low turbine entry temperature (compared with a gas turbine) is why the Rankine cycle is often used as a bottoming cycle in combined cycle gas turbine power stations.

The Brayton cycle is a constant pressure thermodynamic cycle that converts heat from combustion into work. A Brayton engine, as it applies to a gas turbine system, will consist of a fuel or gas compressor, combustion chamber, and an expansion turbine. Air is drawn into the compressor, mixed with the fuel, and ignited. The resulting work output is captured through a pump, cylinder, or turbine. A Brayton engine forms half of a combined cycle system, which combines with a Rankine engine to further increase overall efficiency. Cogeneration systems typically make use of the waste heat from Brayton engines, typically for hot water production or space heating.

By combining both gas and steam cycles, high input temperatures and low output temperatures can be achieved. The efficiency of the cycles are additive, because they are powered by the same fuel source. A combined-cycle plant has a thermodynamic cycle that operates between the gas turbine's high firing temperature and the waste heat temperature from the condensers of the steam cycle. This large range means that the Carnot efficiency of the cycle is high. The actual efficiency, while lower than this is still higher than that of either plant on its own. The thermal efficiency of a combined-cycle power plant is the net power output of the plant divided by the heating value of the fuel. If the plant produces only electricity, efficiencies of up to 59% can be achieved.

A single-train combined-cycle plant consists of one gas turbine generator, a heat recovery steam generator (HSRG) and a steam turbine generator ("1 x 1" configuration). As an example, an "FA-class" combustion turbine, the most common technology in use for large combined-cycle plants within the state of Texas and other locations throughout the United States, represents a plant with approximately 270 megawatts of capacity.

See Figure 1 – Standard Combined-Cycle Configuration, below.

It is common to find combined-cycle plants using two or even three gas turbine generators and heat recovery steam generators feeding a single, proportionally larger steam turbine generator. Larger plant sizes result in economies of scale for construction and operation, and designs using multiple combustion turbines provide improved part-load efficiency. A 2 x 1 configuration using FA-class technology will produce about 540 megawatts of capacity at International Organization for Standardization ("ISO") conditions. ISO references ambient conditions at 14.7 psia, 59 F, and 60% relative humidity.

Because of high thermal efficiency, high reliability, and low air emissions,

combined-cycle gas turbines have been the new resource of choice for bulk power generation for well over a decade. Other attractive features include significant operational flexibility, the availability of relatively inexpensive power augmentation for peak period operation and relatively low carbon dioxide production.

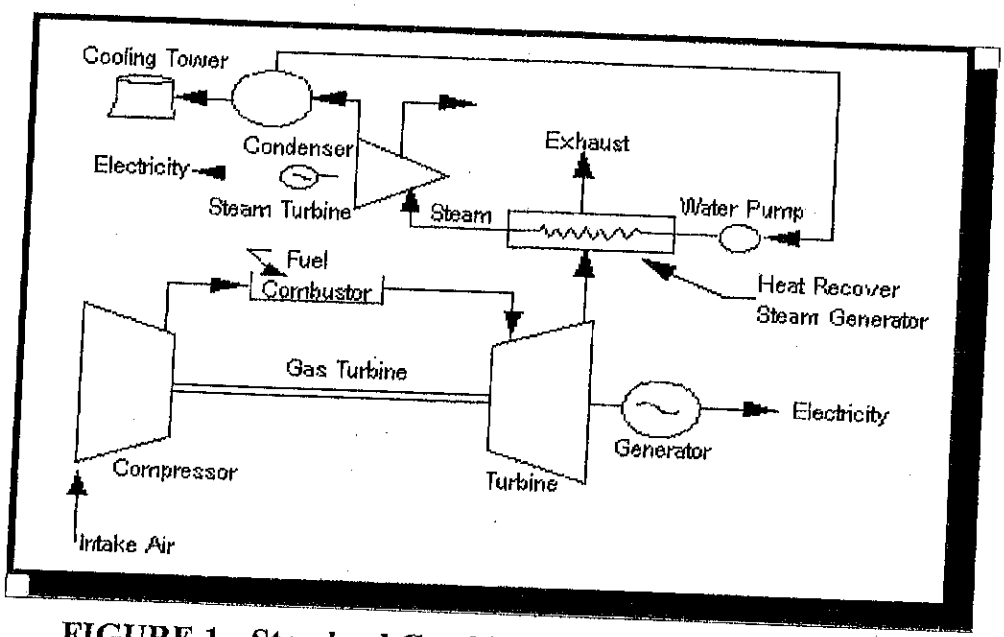

FIGURE 1 - Standard Combined-Cycle Configuration (1)

As an example, consider a gas turbine cycle that has an efficiency of 40%, which is a representative value for current Brayton Cycle gas turbines, and the Rankine Cycle has an efficiency of 30%. The combined-cycle efficiency would be 58%, which is a very large increase over either of the two simple cycles. Some representative efficiencies and power outputs for different cycles are shown in Figure 2 – Comparison of Efficiency and Power Output of Various Power Products, below.

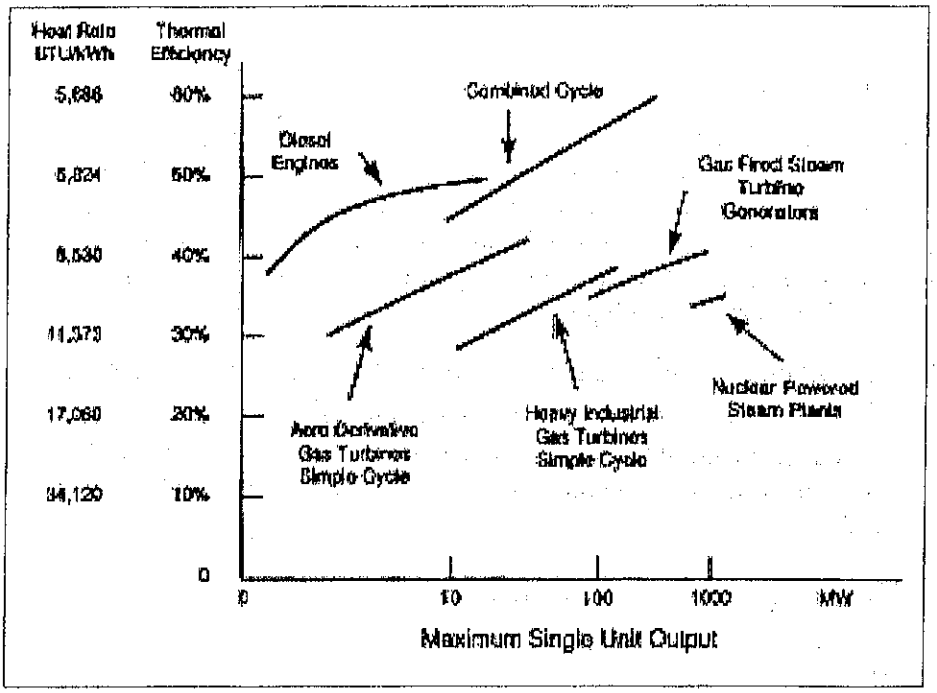

FIGURE 2 - Comparison of efficiency and power output of various power products [Bartol (1997)] (2)

Current Regulatory Authority for Output-Based Emissions

Innovative power technologies such as combined-cycle technology offer enormous potential to improve efficiency and enhance the environmental footprint of power generation through the reduction and/or prevention of air emissions to the environment. Currently, two thirds of the fuel burned to generate electricity in traditional fossil-fired steam boilers is lost. Traditional U.S. power generation facility efficiencies have not increased since the 1950s and more than one fifth of the U.S. power plants are more than 50 years old. In addition, these facilities are the leading contributors to U.S. emissions of carbon dioxide, NOx, sulfur dioxide ("SO2"), and other contaminants into the air and water.

The ability to recognize and regulate the efficiency benefits of pollution reduction and/or prevention through the use of combined-cycle technology is achieved through the use of Output-Based emissions standards, incorporated since September 1998 within the U.S. EPA's new source performance standards ("NSPS") for NOx, from both new utility boilers and new industrial boilers. Pursuant to section 407(c) of the Clean Air Act in subpart Da (Electric Utility Steam Generating Units) and subpart Db (Industrial-Commercial-Institutional Steam Generating Units) of 40 CFR part 60, the U.S. EPA revised the NOx emissions limits for steam generating units for which construction, modification, or reconstruction commenced after July 9, 1997 (3). Output-Based regulations are also exemplified by those used in the U.S. EPA's NOx Cap and Trade Program for the NOx State Implementation Plan ("SIP") Call

of 1998, which uses units of measure such as lb/MWh generated or lb concentration ("ppm"), which relate to the emissions to the productive output – electrical generation of the process.(4)

The use of innovative technologies such as combined-cycle units reduces fossil fuel use and leads to multi-media reductions in the environmental impacts of the production, processing transportation, and combustion of fossil fuels. In addition, reducing fossil fuel combustion is a pollution prevention measure that reduces emissions of all products of combustion, not just the target pollutant (currently NOx) of a federal regulatory program.

Authority to Expand Pollution Control Equipment & Categories in Texas

Under Texas House Bill 3732 ("HB3732") enacted in 2007, Section 11.31 of the Texas Tax Code is amended to add certain plant equipment and systems to the current list of air, water, or land pollution control devices exempt from property taxation in Texas.

Specifically, the language reads as follows:

SECTION 4. Section 11.31, Tax Code, is amended by adding Subsections (k), (l), and (m) to read as follows:
(k) The Texas Commission on Environmental Quality shall adopt rules establishing a nonexclusive list of facilities, devices, or methods for the control of air, water, or land pollution, which must include:
(1) coal cleaning or refining facilities;
(2) atmospheric or pressurized and bubbling or circulating fluidized bed combustion systems and gasification fluidized bed combustion combined-cycle systems;
(3) ultra-supercritical pulverized coal boilers;
(4) flue gas recirculation components;
(5) syngas purification systems and gas-cleanup units;
(6) enhanced heat recovery systems;
(7) exhaust heat recovery boilers;
(8) heat recovery steam generators;
(9) superheaters and evaporators;
(10) enhanced steam turbine systems;
(11) methanation;
(12) coal combustion or gasification byproduct and coproduct handling, storage, or treatment facilities;
(13) biomass cofiring storage, distribution, and firing systems;
(14) coal cleaning or drying processes, such as coal drying/moisture reduction, air jigging, precombustion decarbonization, and coal flow balancing technology;
(15) oxy-fuel combustion technology, amine or chilled ammonia scrubbing, fuel or emission conversion through the use of catalysts, enhanced scrubbing technology, modified combustion technology such as chemical looping, and cryogenic technology;
(16) if the United States Environmental Protection Agency adopts a final rule or regulation regulating carbon dioxide as a pollutant, property that is used, constructed, acquired, or installed wholly or partly to capture carbon dioxide from an anthropogenic source in this state that is geologically sequestered in this state;
(17) fuel cells generating electricity using hydrogen derived from coal, biomass, petroleum coke, or solid waste; and
(18) any other equipment designed to prevent, capture, abate, or monitor nitrogen oxides, volatile organic compounds, particulate matter, mercury, carbon monoxide, or any criteria pollutant.
(l) The Texas Commission on Environmental Quality by rule shall update the list adopted under Subsection (k) at least once every three years. An item may be removed from the list if the commission finds compelling evidence to support the conclusion that the item does not provide pollution control benefits.
(m) Notwithstanding the other provisions of this section, if the facility, device, or method for the

control of air, water, or land pollution described in an application for an exemption under this section is a facility, device, or method included on the list adopted under Subsection (k), the executive director of the Texas Commission on Environmental Quality, not later than the 30th day after the date of receipt of the information required by Subsections (c)(2) and (3) and without regard to whether the information required by Subsection (c)(1) has been submitted, shall determine that the facility, device, or method described in the application is used wholly or partly as a facility, device, or method for the control of air, water, or land pollution and shall take the actions that are required by Subsection (d) in the event such a determination is made.

Under the TCEQ's recently updated "Tax Relief for Pollution Control Property – Application Instructions and Equipment and Categories List – Effective January 2008", the Equipment and Categories List - Part B ("ECL Part B") is a list of the pollution control property categories adopted and set forth in TTC Sec. 26.045(f). The taxpayer is to supply a pollution control percentage for the equipment listed in Part B via calculations demonstrating pollution control, prevention and/or reductions achieved by the listed equipment or systems.

The following property descriptions outline the environmental purpose, including the anticipated environmental benefit of pollution control additions considered under the Application Instructions' ECL Part B that have been constructed and placed into use at the Facility as of its placed-in-service date, or installed subsequent to in-service since 1994:

Property Descriptions

Item #1 & 3 Combined-Cycle Gas Turbine Plant Heat Recovery Steam Generator ("HRSG") and Support Systems Tier IV B-8

40 CFR Part 60 Subparts DA and DB, NOx Limits for Electric Utility Steam Generating Units and Industrial-Commercial-Institutional Steam Generating Units for New Source Performance Standards ("NSPS").

TAC Rule 106.512, Standard Permit for Electric Generating Units (EGU)

NOTE: Permits issued under Texas Clean Air Act's Health & Safety Code Sections 382.011, applies to all electric generating units that emit air contaminants, regardless of size, and it is to reflect Best Available Control Technology ("BACT") for electric generating units on an output basis in pounds of NOx per megawatt hour, adjusted to reflect a simple cycle power plant.

The heat recovery steam generator ("HRSG") found in the Facility is a heat exchanger that recovers heat from a hot gas stream. It produces steam that can be used in a process or used to drive a steam turbine. A common application for an HRSG is in a combined-cycle power station, where hot exhaust from a gas turbine is fed to an HRSG to generate steam which in turn drives a steam turbine. This combination produces electricity in a more thermally efficient manner than either the gas turbine or steam turbine alone.

The Facility's HRSGs consist of three major components: the Evaporator, Superheater, and Economizer. The different components are put together to meet the operating requirements of the unit. Modular HRSGs normally consist of three sections: an LP (low pressure) section, a reheat/IP (intermediate pressure) section, and an HP (high pressure) section. The reheat and IP sections are separate circuits inside the HRSG. The IP steam partly feeds the reheat section. Each section has a steam drum and an evaporator section where water is converted to steam. This steam then passes through superheaters to raise the temperature and pressure past the saturation point.

Item #2 & 4 Steam Turbine and Support Systems Tier IV B-10

40 CFR Part 60 Subparts DA and DB, NOx Limits for Electric Utility Steam Generating Units and Industrial-Commercial-Institutional Steam Generating Units for New Source Performance Standards ("NSPS").

TAC Rule 106.512, Standard Permit for Electric Generating Units (EGU)

NOTE: Permits issued under Texas Clean Air Act's Health & Safety Code Sections 382.011, applies to all electric generating units that emit air contaminants, regardless of size, and it is to reflect Best Available Control Technology ("BACT") for electric generating units on an output basis in pounds of NOx per megawatt hour, adjusted to reflect a simple cycle power plant.

The steam turbine(s) found in the Facility operate on the Rankine cycle in combination with the Brayton cycle, as described above. Steam created in the Facility HRSG(s) from waste heat that would have otherwise been lost to the atmosphere enters the steam turbine via a throttle valve, where it powers the turbine

and connected generator to make electricity. Use of HRSG/Steam Turbine System combination provides the Facility with an overall efficiency of greater than 50%. Steam turbine systems similar to the Facility's have a history of achieving up to 95% availability on an annual basis and can operate for more than a year between shutdown for maintenance and inspections. (5)

Pollution Control Percentage Calculation: Avoided Emissions Approach

To calculate the percentage of the equipment or category deemed to be pollution control equipment, the Avoided Emissions approach has been used. This approach relies on thermal output differences between a conventional power generation system and the combined-cycle system at the Facility. Specifically, the percentage is determined by calculating the displacement of emissions associated with the Facility's thermal output and subtracting these emissions from a baseline emission rate. These displaced emissions are emissions that would have been generated by the same thermal output from a conventional system.

Greater energy efficiency reduces all air contaminant emissions, including the greenhouse gas, carbon dioxide. Higher efficiency processes include combined-cycle operation and combined heat and power ("CHP") generation. For electric generation the energy efficiency of the process expressed in terms of millions of British thermal units ("MMBTU's") per Megawatt-hour. Lower fuel consumption associated with increased fuel conversion efficiency reduces emissions across the board – that is NOx, SOx, particulate matter, hazardous air pollutants, and greenhouse gas emissions such as CO2.

In calculating the percent exempt for the listed items from the ECL-Part B, we utilized Output-Based NOx allocation method for both power generation projects that replaced existing facilities and "Greenfield" power and heat generation facilities. We looked at the various fossil fuel technologies in use today and chose the baseline facility to be a natural gas fuel-fired steam generator. We benchmarked this conventional generation to the subject natural gas-fired combined cycle generator at the Facility. By doing so, we narrowed the heat rate factors as much as possible to be conservative and uniform in modeling. The benchmark heat rate factor is the following:

Natural Gas fuel-fired Steam Generator: 10,490 BTU's/kWh

This baseline heat rate purposely omits other fossil fuel sources in order to eliminate impurity type characteristics, which in turn eliminated the NOx emission and cost of control differences of each fossil fuel and generator type. Comparing the emissions impact of different energy generation facilities is concise when emissions are measured per unit of useful energy output. For the purpose of our calculations, we converted all the energy output to units of MWh (1 MWh = 3.413 MMBTU), and compared the total emission rate to the baseline facility.

The comparison steps to calculate the NOx reduction is as follows:

Calculation (Reference Schedule A)

Step 1 – Subject Output-Based Limit Calculation (lbs NOx / MWh)

(Input-based Limit (lbs NOx/MMBTU)) X (Heat Rate (Btu/kWh)) / (1,000,000 Btu / 1,000 kWh) = Output: (lbs NOx/MWh),

Step 2 – Subject Output Conversion Calculation (NOx Tons / Year)

(Output (lbs NOx/MWh) X (Unit Design Capacity (MW)) X (Capacity Factor) X ((365 Days) X (24 hrs/day)) / 2,000 lbs = Output: (NOx Tons/Year)

Step 3 – Baseline Output-Based Limit Calculation (lbs NOx / MWh)

(Input-based Limit (lbs NOx/MWh)) X (Heat Rate (Btu/kWh)) / (1,000,000 Btu / 1,000 kWh) = Output: (lbs NOx/MWh)

Step 4 – Baseline Output Conversion Calculation (NOx Tons / Year)

(Output (lbs NOx/MMBtu) X (Unit Design Capacity (MW)) X (Capacity Factor) X ((365 Days) X (24 hrs/day)) / 2,000 lbs = Output: (NOx Tons/Year)

Step 5 – Percent NOx Reduction Calculation

$((\text{Output Baseline})_{\text{step 4}} - (\text{Output Subject}))_{\text{step 2}} / (\text{Output Subject})_{\text{step 2}} = \%$ Reduction Output Subject

Step 6 – Percent Exempt Calculation

(Total Subject Facility Cost) X (% NOx Reduction) = Capital Cost of NOx Avoidance

Step 7 – Percent Exempt Calculation

Total Cost of NOx Avoidance / Total Cost of HB 3732 Equipment = % Exempt

- If % Exempt is greater than 100% HB 3732 Equipment is 100% Exempt
- If % Exempt is less than 100% then HB 3732 Equipment is partially exempt at the Step 6 calculation.

NOTE: See the attached calculation sheet for the details regarding Facility-specific calculations and property tax exemption percentage results based upon these calculations.

REFERENCES

1. "Output-Based Regulations: A Handbook for Air Regulators", U.S. Environmental Protection Agency, Office of Atmospheric Programs – Climate Protection Partnerships Division, August, 2004, p.4.

2. "Output-Based Emissions Standards; Advancing Innovative Energy Technologies", Northeast-Midwest Institute; 2003, p. 9.

3. IBID, p.13.

4."Output-Based Regulations: A Handbook for Air Regulators", U.S. Environmental Protection Agency, Office of Atmospheric Programs – Climate Protection Partnerships Division, August, 2004, p.4.

5. http://www.cogeneration.net/Combined_Cycle_Power_Plants.htm

6. "Output-Based Emissions Standards; Advancing Innovative Energy Technologies", Northeast-Midwest Institute; 2003, p. 9.

9. PARTIAL PERCENTAGE CALCULATION

N/A.

10. PROPERTY CATEGORIES AND COSTS

See attached Schedule 10.

11. EMISSION REDUCTION INCENTIVE GRANT

Will an application for an Emission Reduction Incentive Grant be on file for this property/project:

[ ] Yes [X] No

12. APPLICATION DEFICIENCIES

After an initial review of the application, the TCEQ may determine that the information provided with the application is not sufficient to make a use determination. The TCEQ may send a notice of deficiency, requesting additional information that must be provided within 30 days of written notice.

13. FORMAL REQUEST FOR SIGNATURE

By signing this application, you certify that this information is true to the best of your knowledge and belief.

NAME: _____ DATE: 22 Apr 2008

TITLE: Director

COMPANY: Duff and Phelps LLC

Under Texas Penal Code, Section 37.10, if you make a false statement on this application, you could receive a jail term of up to one year and a fine up to $2,000, or a prison term of two to 10 years and a fine of up to $5,000.

14. DELINQUENT FEE/PENALTY PROTOCOL

This form will not be processed until all delinquent fees and/or penalties owed to the TCEQ or the Office of the Attorney General on behalf of the TCEQ are paid in accordance with the Delinquent Fee and Penalty Protocol. (Effective 9/1/2006)

Navasota - Colorado Bend - Phase I
3821 S. State Hwy 60
TCEQ Use Determination Application - 2008
Scheule 10
Tier IV

10. PROPERTY CATEGORIES AND COST

PROPERTY	PROJECT ID. NO.	IN SERVICE DATE	TAXABLE ON OR BEFORE 1/1/94? (Y / N)	TIER IV DECISION FLOW CHART BOX	ECL NUMBER	ESTIMATED PURCHASE COST	% EXEMPT	EXEMPT COST
Heat Recovery Steam Generators (HRSG)	1	2007	N	3	B-8	$ 26,544,805	100%	$ 26,544,805
Steam Turbine System	2	2007	N	3	B-10	$ 10,091,206	100%	$ 10,091,206
					Tier IV Total	$ 36,636,012		$ 36,636,012

Navasota - Colorado Bend - Phase II
3821 S. State Hwy 60
TCEQ Use Determination Application - 2008
Scheule 10
Tier IV

10. PROPERTY CATEGORIES AND COST

PROPERTY	PROJECT ID. NO.	IN SERVICE DATE	TAXABLE ON OR BEFORE 1/1/94? (Y / N)	TIER IV DECISION FLOW CHART BOX	ECL NUMBER	ESTIMATED PURCHASE COST	% EXEMPT	EXEMPT COST
Heat Recovery Steam Generators (HRSG)	3	CWIP	N	3	B-8	$ 30,018,278	100%	$ 30,018,278
Steam Turbine System	4	CWIP	N	3	B-10	$ 22,386,336	100%	$ 22,386,336
					Tier IV Total	$ 52,404,614		$ 52,404,614

52 404 614
36 636 012
89 040 636

Navasota Wharton Energy Partners LP
Colorado Bend Energy Center - Phase I
Schedule A - 2008 Thermal Efficiency Calculation

Subject Details:

Average Heat Rate [1]	7,746 (Btu/kWh)
NOx Emissions [2]	168.6 Tons / year
Plant Capacity [3]	275 MW
Capacity Factor [4]	100.00%
Technology [5]	Combined Cycle
Total Subject Facility Cost [6]	$169,296,979
Total Cost of Tier IV Equipment [7]	$36,636,012

Baseline Details:

Average Heat Rate [8]	10,490 Btu/kWh
Technology [9]	Steam Turbine

STEP 1
Subject Output-Based Limit Calculation (lbs NOx / MWh)

Input-based Limit (lbs NOx/MMBtu)	x	Heat Rate (Btu/kWh)	/	Unit Conversions (1,000,000 Btu / 1000 kWh)	=	Output-based Limit (lbs NOx/MWh)
0.0198		7,746		1,000		0.1533

STEP 2
Subject Output Conversion Calculation (NOx Tons / Year)

Output-based Limit (lbs NOx/MWh)	x	Capacity (MW)	x	Capacity Factor	x	Unit Conversions (365 days * 24 Hours / 2,000 lbs)	=	Output NOx (Tons/Year)
0.1533		275		100.00%		4		168.6

STEP 3
Baseline Output-Based Limit Calculation (lbs NOx / MWh)

Input-based Limit (lbs NOx/MMBtu)	x	Heat Rate (Btu/kWh)	/	Unit Conversions (1,000,000 Btu / 1000 kWh)	=	Output-based Limit (lbs NOx/MWh)
0.0198		10,490		1,000		0.2077

STEP 4
Baseline Output Conversion Calculation (NOx Tons / Year)

Output-based Limit (lbs NOx/MWh)	x	Capacity (MW)	x	Capacity Factor	x	Unit Conversions (365 days * 24 Hours / 2,000 lbs)	=	Output NOx (Tons/Year)
0.2077		275		100.00%		4		228.5

STEP 5
Percent NOx Reduction Calculation

(Output Baseline	-	Output Subject)	/	Output Subject	=	% NOx Reduction
228.5		168.6		168.6		35.5%

STEP 6
Percent Exempt Calculation

Total Subject Unit Cost	X	% NOx Reduction	=	Capital Cost of NOx Avoidance
$169,296,979		35.5%		$60,100,428

STEP 7
Percent Exempt Calculation

Total Cost of NOx Avoidance	/	Total Cost of HB 3732 Equipment	=	% Exempt
$60,100,428		$36,636,012		164.0%

Conclude	100%

(1) - Heat rate represents plant performance test heat rate (HHV) and was provided by the client
(2) - NOx emissions is the NOx pollutant emission permit limit in tons per year provided by the client
(3) - Plant capacity is the average nominal capacity and was provided by the client
(4) - Capacity factor is the maximum operating level allowed under the emissions permit provided by the client
(5) - Technology represents the actual technology of the subject
(6) - Total subject facility cost represents the total cost to build the entire facility and it was determined based on data provided by the client
(7) - Total Tier IV equipment was determined by allocating the eligible TCEQ ECL part B equipment and their associated cost from actual data provide by the client
(8) - Baseline heat rate was published by the Energy Information Administration ("EIA")
(9) - Baseline technology represents the technology that the subject would have replaced at the time of the subjects construction

Navasota Wharton Energy Partners LP
Colorado Bend Energy Center - Phase II
Schedule A - 2008 Thermal Efficiency Calculation

Subject Details:	
Average Heat Rate[1]	7,746 (Btu/kWh)
NOx Emissions [2]	168.6 Tons / year
Plant Capacity [3]	275 MW
Capacity Factor [4]	100.00%
Technology [5]	Combined Cycle
Total Subject Facility Cost [6]	$162,042,822
Total Cost of Tier IV Equipment [7]	$52,404,614
Baseline Details:	
Average Heat Rate [8]	10,490 Btu/kWh
Technology [9]	Steam Turbine

STEP 1
Subject Output-Based Limit Calculation (lbs NOx / MWh)

Input-based Limit (lbs NOx/MMBtu)		Heat Rate (Btu/kWh)		Unit Conversions (1,000,000 Btu / 1000 kWh)	=	Output-based Limit (lbs NOx/MWh)
0.0198	x	7,746	/	1,000	=	0.1533

STEP 2
Subject Output Conversion Calculation (NOx Tons / Year)

Output-based Limit (lbs NOx/MWh)		Capacity (MW)		Capacity Factor		Unit Conversions (365 days * 24 Hours / 2,000 lbs)	=	Output NOx (Tons/Year)
0.1533	x	275	x	100.00%	x	4	=	168.6

STEP 3
Baseline Output-Based Limit Calculation (lbs NOx / MWh)

Input-based Limit (lbs NOx/MMBtu)		Heat Rate (Btu/kWh)		Unit Conversions (1,000,000 Btu / 1000 kWh)	=	Output-based Limit (lbs NOx/MWh)
0.0198	x	10,490	/	1,000	=	0.2077

STEP 4
Baseline Output Conversion Calculation (NOx Tons / Year)

Output-based Limit (lbs NOx/MWh)		Capacity (MW)		Capacity Factor		Unit Conversions (365 days * 24 Hours / 2,000 lbs)	=	Output NOx (Tons/Year)
0.2077	x	275	x	100.00%	x	4	=	228.5

STEP 5
Percent NOx Reduction Calculation

(Output Baseline		Output Subject)		Output Subject	=	% NOx Reduction
228.5	-	168.6	/	168.6		35.5%

STEP 6
Percent Exempt Calculation

Total Subject Unit Cost		% NOx Reduction	=	Capital Cost of NOx Avoidance
$162,042,822	X	35.5%		$57,525,202

STEP 7
Percent Exempt Calculation

Total Cost of NOx Avoidance		Total Cost of HB 3732 Equipment	=	% Exempt
$57,525,202	/	$52,404,614		109.8%

Conclude	100%

(1) - Heat rate represents the anticipated heat rate (HHV) and was provided by the client
(2) - NOx emissions is the NOx pollutant emission permit limit in tons per year provided by the client
(3) - Plant capacity is the average nominal capacity and was provided by the client
(4) - Capacity factor is the maximum operating level allowed under the emissions permit provided by the client
(5) - Technology represents the actual technology of the subject
(6) - Total subject facility cost represents the total cost to build the entire facility and it was determined based on data provide by the client
(7) - Total Tier IV equipment was determined by allocating the eligible TCEQ ECL part B equipment and their associated cost from actual data provide by the client
(8) - Baseline heat rate was published by the Energy Information Administration ("EIA")
(9) - Baseline technology represents the technology that the subject would have replaced at the time of the subjects construction

Attachment B

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

USE DETERMINATION

The Texas Commission on Environmental Quality has reviewed Use Determination Application, **07-11926**, filed by:

NAVASOTA WHARTON ENERGY PARTNERS LP
COLORADO BEND
3821 S STATE HWY 60
WHARTON TX 77488

The pollution control property/project listed in the Use Determination Application is:

This facility has four thermally efficient heat recovery steam generators (HRSGs) and two steam turbines. This application is a Tier IV application seeking a partial use determination for the HRSGs and the enhanced steam turbines.

The outcome of the review is:

A 100% positive use determination for the four Heat Recovery Steam Generators. This equipment is considered to be pollution control equipment and was installed to meet or exceed federal or state regulations.

A negative determination is issued for the two steam turbines. The use of the steam turbines does not provide an environmental benefit at the site. The steam turbines are not considered to be pollution control equipment.

Executive Director

May. 1. 2008
Date

TAX RELIEF FOR POLLUTION CONTROL PROPERTY: TECHNICAL REVIEW DOCUMENT

Reviewed By: RLH App. No.: 07 - 11926 Review Start Date: 4/8/2008

Company Name: NAVASOTA WHARTON ENERGY PARTNERS LP
Facility Name: COLORADO BEND
County: WHARTON Outstanding Fees: N
Batch/Voucher Number:B500028

ADMINISTRATIVE REVIEW

Administrative Complete Date:4/8/2008

TIER LEVEL
What Tier is this application? The application was filed as a Tier IV application. Is this the appropriate level?

The property listed on this application, Heat Recovery Steam Generators and a steam turbine are items B8 and B10 on the Equipment and Categories List. This application was filed as a Tier IV. Tier IV is the appropriate level for this application.

RELEVANT RULE, REGULATION, OR STATUTORY PROVISION
The rule listed in the application is: 40 CFR 60.44Da
The appropriate rule is: 40 CFR 60.44Da

Explain why this is the appropriate rule?

40 CFR 60.Subpart DA: Standards of Performance for New Stationary Sources. Standards of performance for Electric Utility Steam Generating Units for Which Construction is Commenced after September 18, 1978. This is an appropriate rule.

BRIEF DESCRIPTION OF PROPERTY
The property is described as:

This facility has four thermally efficient heat recovery steam generators (HRSGs) and two steam turbines. This application is a Tier IV application seeking a partial use determination for the HRSGs and the enhanced steam turbines.

Is an adequate description and purpose of the property provided? Does it list the anticipated environmental benefits? Are sketches and flow diagrams provided if needed?

An adequate description of the property was provided, and the purpose of the property was listed. The anticipated environmental benefit is listed. Sketches and flow diagrams were provided.

DECISION FLOWCHART(30 TAC 17.15(a))
Mark the appropriate boxes: Box 3 Box 5 Box 6(IV) Y Box 10(III) Box 12(I) Box 13(II)
PART B DECISION FLOWCHART (17.15(b))
Mark the appropriate boxes: Box 1Y Box 2 Y Box 3 Y

Describe how the property flowed through the Decision Flowchart:

The Heat Recovery Steam Generators (HRSGs) are listed on Part B of the Equipment & Categories List as item B-8. As Part B equipment the HRSGs leave the Decision Flow Chart at Box 6 and pass through Box 1 of the Part B Decision Flow Chart with a yes answer. Since the use

of HRSGs provide an environmental benefit of reduced NOx emissions at the site there is a yes answer for Box 2. Since there is a reduction in NOx emissions there is an environmental rule which is being met, so there is a yes answer to Box 3. The steam turbine passes through Box 1 on the Part B Decision Flow Chart with a yes answer. Since the use of the steam turbine does not provide an environmental benefit at the site a no answer is the result of Box 2. The steam turbine is not eligible for a positive determination.

TIER III or IV APPLICATIONS

Does your calculation agree with the applicants?

No. The application contains a proposed formula for calculating the pollution control value of the HRSGs and the steam turbine. The formula is outcome determinative, and its focus is not on the pollution control aspect of the property. The Executive Director disagrees with this formula.

PROPERTY CATEGORIES AND COSTS

Is the table completed correctly? Has the applicant certified that all listed property became taxable for the first time after January 1, 1994? Is all information necessary for conducting the technical review included.

The table was completed correctly. The applicant certified that all listed property became taxable for the first time after January 1, 1994. All the information necessary for conducting the technical review was included on the application.

TECHNICAL DEFICIENCIES

Is the application complete as received: Y If the application was not administratively complete explain below when justifying the final decision in the final determination section. If the application was not technically complete then:

Provide the language to be used in the Notice of Deficiency (NOD) letter:

Summarize the NOD response:

Provide the language used in the second NOD letter:

Summarize the second NOD response:

Provide the language used in the thied NOD letter:

Summarize the third NOD response:

FINAL DETERMINATION

If the property description has been summarized enter the detailed property description:

This facility has four thermally efficient heat recovery steam generators (HRSGs) and two steam

turbines. This application is a Tier IV application seeking a partial use determination for the HRSGs and the enhanced steam turbines.

Provide the reason for your final determination:

The Heat Recovery Steam Generators meet all of the requirements of Chapter 17. A positive use determination based on the most appropriate formula should be issued for the Heat Recovery Steam Generators. The most appropriate formula has been determined by the Executive Director. A negative determination should be issued for the steam turbine. The use of the steam turbine does not result in there being an environmental benefit at the site.

Provide the language for the final determination.

A positive use determination of 100% for the four Heat Recovery Steam Generators. A negative determination is issued for the steam turbine. The use of the steam turbine does not provide an environmental benefit at the site. The steam turbine is not considered to be pollution control equipment.

Highlight the required signatures and establish the appropriate due dates.

Reviewed: Ronald Hall **Date Signed:** 5/1/08

Peer Reviewed: Gary McAuliffe **Date Signed:** 5-1-08

Team Leader: David Lee **Date Signed:** 5/1/08

Section Manager: [signature] **Date Signed:** MAY 1 2008

Division Director: Glenn M. Montgomery **Date Signed:** MAY 1 2008

Attachment C

WHARTON COUNTY
APPRAISAL DISTRICT
2407 1/2 N. Richmond Road
Wharton, Texas 77488

Phone: 979-532-8931
Fax: 979-532-5691

May 19, 2008

Office of the Chief Clerk - MC 105
Texas Commission on Environmental Quality
PO Box 13087
Austin, TX. 78711-3087

Re: TCEQ Use Determination No. **07-11926**

Dear Ms. Castañuela,

I am writing this letter as an official appeal of the TCEQ's property tax Pollution Control Exemption Use Determination with the tracking number **07-11926** filed by **Navasota Wharton energy Partners I** for the **Colorado Bend Power Generation** facility. We believe that the Heat Recovery Steam Generators described in this application are production equipment in that they burn natural gas to create steam to generate electricity. This creates pollutants, not reduces them.

Secondly, the pollution control components associated with the HRSG's that do reduce pollution have already been exempted under Use Determination 07-11925. Therefore, this second exemption of the entire HRSG only serves to exempt the non-pollution control components of the units.

I respectfully request that our appeal regarding this Use Determination be granted and the exemption be denied.

Hugh L. Landrum & Associates, Inc. will be acting as our agent in this matter.

Thank you for your time and consideration.

Sincerely,

Tylene Gamble
Chief Appraiser
Wharton County Appraisal District

Attachment D

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

December 3, 2008

LaDonna Castañuela, Chief Clerk
Texas Commission on Environmental Quality
Office of the Chief Clerk, MC-105
P.O. Box 13087
Austin, Texas 78711-3087

Re: TCEQ Docket Numbers:
2008-0830-MIS-U (UD 07-11914/Tenaska Gateway Partners, Ltd)
2008-0831-MIS-U (UD 07-11966/Freestone Power Generation, L.P)
2008-0832-MIS-U (UD 07-11971/Borger Energy Associates, LP)
2008-0849-MIS-U (UD 07-11969/Brazos Valley Energy, L.P.)
2008-0850-MIS-U (UD 07-11994/Freeport Energy Center, L.P.)
2008-0851-MIS-U (UD 07-11926/Navasota Wharton Energy Partners, LP)
Executive Director's Response Brief to Rusk County, Freestone Central, Hutchinson County, Fort Bend Central, Brazoria County, and Wharton County Appraisal Districts' Appeals of the Executive Director's Use Determinations

Dear Ms. Castañuela:

Enclosed for filing, please find an original and 7 copies of the *"Executive Director's Response Brief to Rusk County, Freestone Central, Hutchinson County, Fort Bend Central, Brazoria County, and Wharton County Appraisal Districts' Appeals of the Executive Director's Negative Use Determinations."*

Please file-stamp these documents and return one copy to D. A. Chris Ekoh, Staff Attorney, Environmental Law Division, MC 173. If you have any questions, please do not hesitate to contact me at (512) 239-5487.

Sincerely,

D. A. Chris Ekoh, Staff Attorney
Environmental Law Division

TCEQ Docket Numbers
2008-0830-MIS-U (UD 07-11914/Tenaska Gateway Partners, Ltd – Rusk County)
2008-0831-MIS-U (UD 07-11966/Freestone Power Generation, L.P. – Freestone County)
2008-0832-MIS-U (UD 07-11971/Borger Energy Associates, LP – Hutchinson County)
2008-0849-MIS-U (UD 07-11969/Brazos Valley Energy, L.P. – Fort Bend County)
2008-0850-MIS-U (UD 07-11994/Freeport Energy Center, L.P. – Brazoria County)
2008-0851-MIS-U (UD 07-11926/Navasota Wharton Energy Partners, LP – Wharton County)

APPEAL OF THE EXECUTIVE DIRECTOR'S USE DETERMINATIONS ISSUED TO TENASKA GATEWAY PARTNERS, LTD; FREESTONE POWER GENERATION, L.P.; BORGER ENERGY ASSOCIATES, LP; BRAZOS VALLEY ENERGY, L.P.; FREEPORT ENERGY CENTER, L.P.; and NAVASOTA WHARTON ENERGY PARTNERS, LP	§	**BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

EXECUTIVE DIRECTOR'S RESPONSE BRIEF TO RUSK COUNTY, FREESTONE CENTRAL, HUTCHINSON COUNTY, FORT BEND CENTRAL, BRAZORIA COUNTY, AND WHARTON COUNTY APPRAISAL DISTRICTS' APPEALS OF THE EXECUTIVE DIRECTOR'S USE DETERMINATIONS

The Executive Director of the Texas Commission on Environmental Quality (the Commission or TCEQ) files this Response to the Appeals of the Executive Director's Use Determinations Issued to Tenaska Gateway Partners, Ltd (Tenaska); Freestone Power Generation, L.P. (Freestone); Borger Energy Associates, LP (Borger); Brazos Valley Energy, L.P (Brazos); Freeport Energy Center, L.P (Freeport); and Navasota Wharton Energy Partners, LP (Navasota). The appeals were submitted by or on behalf of the affected county appraisal districts. The regulated entities did not appeal the Executive Director's use determinations.

For the reasons described below, the Executive Director respectfully requests that the Commission adopt the recommendation of the Executive Director and remand the respective appeals to the Executive Director to issue new determinations consistent with the Executive Director's recommendation as adopted by the Commission.

Part I of this brief presents a background of the Tax Exemption for Pollution Control Property Program, including a discussion of House Bill 3732; Part II discusses the procedural history of each application including the Executive Director's determinations; Part III describes the devices involved in these appeals, and the circumstances leading to the formation of a Workgroup to assist in establishing the method of calculating the proper pollution control percentage for the devices; and Part IV presents the Executive Director's recommendation to the Commission on the proper pollution control percentage to adopt for the devices involved in these appeals.

I.

PROGRAM BACKGROUND

These appeals of the Executive Director's use determinations are filed pursuant to H.B. 3121 (77th Tex. Legislature, 2001) establishing an appeals process for use determinations and the Commission rules implementing the legislation.[1]

In 1993, the citizens of Texas voted to adopt a tax measure called Proposition 2 (Prop 2). Prop 2 was implemented when Article 8, § 1-l was added to the Texas Constitution on November 2, 1993. The amendment allowed the legislature to "exempt from ad valorem taxation all or part of real and personal property used, constructed, acquired, or installed wholly or partly to meet or exceed rules or regulations adopted by any environmental protection agency of the United States, this state, or a political subdivision of this state for the prevention, monitoring, control, or reduction of air, water, or land pollution."[2]

The Texas Legislature codified the constitutional amendment in 1993 as TEX. TAX CODE § 11.31 (effective January 1, 1994). The statutory language in the codified version mirrored the language of Article 8, § 1-l. The statute sets up a two-step process to obtain tax exemption for pollution control property. First, a person seeking tax exemption for pollution control property must obtain a positive use determination from the Executive Director that the property is used wholly or partly for pollution control.[3] Second, once a person obtains a positive use determination from the Executive Director, the person then applies to the appraisal district where the property is located to receive the actual tax exemption. It is the performance of this second step by the chief appraiser that removes the property from the tax roll.[4]

In 2001, the legislature amended Section 11.31 when it passed House Bill 3121 (effective September 1, 2001). This bill added several procedural requirements to Section 11.31, including a provision requiring the establishment and implementation of a process to appeal use determinations.[5] The amendment authorized the Commission to adopt rules establishing specific standards for the Executive Director to follow in making use determinations for property that qualified for either full or partial determinations.[6]

In 2007, the legislature amended Section 11.31 when it passed House Bill 3732 (effective September 1, 2007).[7] The amendment added three new subsections to Section 11.31 by requiring the:

- Commission to adopt, by rule, a list of pollution control property which must include the 18 categories of equipment outlined in HB 3732;

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[1] See TEX. TAX CODE § 11.31 and 30 TEX. ADMIN. CODE § 17.25.
[2] TEX. CONST. art. 8, § 1-l(a) (November 2, 2002).
[3] TEX. TAX CODE § 11.31(c) & (d).
[4] TEX. TAX CODE § 11.31(i).
[5] See TEX. TAX CODE § 11.31(e).
[6] TEX. TAX CODE § 11.31(g).
[7] House Bill 3732 (80th Legislature, 2007).

- Commission to adopt a procedure to review the list at least once every three years and allows the removal of items from the list when there is compelling evidence that the item does not provide pollution control; and

- Executive Director to review applications containing only items on the adopted list, and to issue a determination without regard to the information provided in response to Section 11.31(c)(1) within 30 days of receipt of the required application documents.[8]

On January 16, 2008, the Commission adopted rules implementing HB 3732.[9] The adopted rules include the "Equipment and Categories List" (ECL).[10] Part B of the ECL consists of the 18 categories of equipment listed by the legislature in HB 3732.[11] The rules revised the review standards contained in Section 17.15 by creating a revised "Decision Flow Chart" and adopting a new "Part B Decision Flow Chart."[12] The rules created a new Tier level of application (Tier IV) for the categories of equipment contained in Part B of the ECL.[13] The use determinations subject to these appeals were filed as Tier IV applications under the newly adopted rules.

Appeals under 30 TEX. ADMIN. CODE § 17.25 may be filed by either the applicant seeking the determination, or by the chief appraiser of the tax appraisal district affected by the determination.[14] The appeal must be in writing and filed within 20 days of receipt of the use determination letter.[15] The Applicant is presumed to have received notice of the determination on the "third regular business day after the date the notice of the Executive Director's action is mailed by first class mail."[16] The appellant is required by Section 17.25(b)(5) to explain the basis for the appeal. Under Section 11.31(i), "the chief appraiser shall accept a final determination by the executive director as conclusive evidence that the facility, device, or method is used wholly or partly as pollution control property."

II.

PROCEDURAL BACKGROUND

Tenaska Gateway Partners, Ltd – Rusk County (Use Determination Number 07-11914)

On March 14, 2008, Tenaska filed a Tier IV application with the Executive Director seeking a use determination under Section 11.31 of the Texas Tax Code for 3 Heat Recovery Steam Generators (HRSG) and 1 enhanced steam turbine. Tenaska claimed the devices were installed to control Nitrogen Oxides (NO_x) and cited 40 C.F.R § 60.44Da and 30 TEX. ADMIN. CODE § 117.3010 as the rules it is meeting or exceeding by installing the devices. The application was

[8] Id. See also, 33 Tex.Reg 932, 933 (February 1, 2008).
[9] 33 Tex.Reg 932 (February 1, 2008). The rules became effective on February 7, 2008.
[10] 33 Tex.Reg at 956; and 30 TEX.ADMIN. CODE 17.14(a) (Effective February 7, 2008). Unless otherwise specifically stated, all references to 30 TAC Chapter 17 refer to the rules effective February 7, 2008.
[11] 33 Tex.Reg at 967; and 30 TEX.ADMIN. CODE 17.14(a).
[12] 30 TEX.ADMIN. CODE 17.15(a) and (b).
[13] 30 TEX.ADMIN. CODE 17.2(16).
[14] TEX. TAX CODE § 11.31(e); and 30 TEX. ADMIN. CODE § 17.25(a)(2).
[15] 30 TEX. ADMIN. CODE § 17.25(b)
[16] Id.

declared to be administratively complete on April 8, 2008. The technical review of the application was completed on May 1, 2008. On May 1, 2008, the Executive Director issued a 100% positive use determination for the HRSGs and a negative use determination for the enhanced steam turbine. Rusk County Appraisal District filed a timely appeal on May 19, 2008. On May 27, 2008, Wayne Frazell (with Pritchard & Abbott, Inc.) filed "detailed comments" on behalf of Rusk County Appraisal District, explaining its reasons for appeal. A copy of the application, administrative review documents, technical review documents, and use determination letter are attached herein as **ED's Exhibit 1**.

Freestone Power Generation L.P – Freestone County (Use Determination Number 07-11966)

On March 28, 2008, Freestone filed a Tier IV application with the Executive Director seeking a use determination under Section 11.31 of the Texas Tax Code for 4 HRSGs, 2 steam turbines, and support systems. Freestone claimed the devices were installed to control Nitrogen Oxides (NO_x) and cited 40 C.F.R § 60.44Da and 30 TEX. ADMIN. CODE § 106.512 as the rules it is meeting or exceeding by installing the devices. The application was declared to be administratively complete on April 8, 2008. The technical review of the application was completed on May 1, 2008. On May 1, 2008, the Executive Director issued a 100% positive use determination for the HRSGs and a negative use determination for the steam turbines, and support systems. Freestone Central Appraisal District filed a timely appeal on May 16, 2008. On May 27, 2008, Wayne Frazell (with Pritchard & Abbott, Inc.) filed "detailed comments" on behalf of Freestone County Appraisal District explaining the its reasons for appeal. A copy of the application, administrative review documents, technical review documents, and use determination letter are attached herein as **ED's Exhibit 2**.

Borger Energy Associates, LP – Hutchinson County (Use Determination Number 07-11971)

On March 31, 2008, Borger filed a Tier IV application with the Executive Director seeking a use determination under Section 11.31 of the Texas Tax Code for 2 HRSGs. Borger claimed the devices were installed to control Nitrogen Oxides (NO_x) and cited 40 C.F.R § 60.44Da and 30 TEX. ADMIN. CODE § 106.512 as the rules it is meeting or exceeding by installing the devices. The application was declared to be administratively complete on April 8, 2008. The technical review of the application was completed on May 1, 2008. On May 1, 2008, the Executive Director issued a 100% positive use determination for the HRSGs. Hutchinson County Appraisal District filed a timely appeal on May 16, 2008. On May 27, 2008, Wayne Frazell (with Pritchard & Abbott, Inc.) filed "detailed comments" on behalf of Hutchinson County Appraisal District explaining the its reasons for appeal. A copy of the application, administrative review documents, technical review documents, and use determination letter are attached herein as **ED's Exhibit 3**.

Brazos Valley Energy L.P – Fort Bend County (Use Determination Number 0711969)

On March 28, 2008, Brazos filed a Tier IV application with the Executive Director seeking a use determination under Section 11.31 of the Texas Tax Code for 2 HRSGs and 1 steam turbine. Brazos claimed the devices were installed to control Nitrogen Oxides (NO_x) and cited 40 C.F.R §

60.44Da and 30 TEX. ADMIN. CODE § 106.512 as the rules it is meeting or exceeding by installing the devices. The application was declared to be administratively complete on April 8, 2008. The technical review of the application was completed on May 1, 2008. On May 1, 2008, the Executive Director issued a 100% positive use determination for the HRSGs and a negative use determination for the steam turbine. Fort Bend Central Appraisal District filed a timely appeal on May 21, 2008. A copy of the application, administrative review documents, technical review documents, and use determination letter are attached herein as **ED's Exhibit 4**.

Freeport Energy Center, L.P – Brazoria County (Use Determination Number 07-11994)

On April 3, 2008, Freeport filed a Tier IV application with the Executive Director seeking a partial use determination under Section 11.31 of the Texas Tax Code for 1 HRSG, 1 steam turbine, and condenser and ancillary pump systems. Freeport claimed the devices were installed to control Nitrogen Oxides (NO_x) and cited 40 C.F.R § 60.44Da as the rule it is meeting or exceeding by installing the devices. The application was declared to be administratively complete on April 8, 2008. The technical review of the application was completed on May 1, 2008. On May 1, 2008, the Executive Director issued a 100% positive use determination for the HRSG and a negative use determination for the steam turbine, and condenser and ancillary pump systems. Brazoria County Appraisal District filed a timely appeal on May 21, 2008. A copy of the application, administrative review documents, technical review documents, and use determination letter are attached herein as **ED's Exhibit 5**.

Navasota Wharton Energy Partners, LP – Wharton County (Use Determination Number 07-11926)

On March 19, 2008, Navasota filed a Tier IV application with the Executive Director seeking a use determination under Section 11.31 of the Texas Tax Code for 4 HRSGs and 2 steam turbines. Navasota claimed the devices were installed to control Nitrogen Oxides (NO_x) and cited 40 C.F.R § 60.44Da and 30 TEX. ADMIN. CODE § 106.512 as the rules it is meeting or exceeding by installing the devices. The application was declared to be administratively complete on April 8, 2008. The technical review of the application was completed on May 1, 2008. On May 1, 2008, the Executive Director granted a 100% positive use determination for the HRSGs and a negative use determination for the steam turbines. Wharton County Appraisal District filed a timely appeal on May 21, 2008. A copy of the application, administrative review documents, technical review documents, and use determination letter are attached herein as **ED's Exhibit 6**.

III.

HRSGs and CALCULATION OF POLLUTION CONTROL PERCENTAGE

The properties involved in these appeals are HRSGs and steam turbines used at combined-cycle facilities to generate electricity. The Tier IV applications were submitted under Part B-8 of the ECL for HRSGs and Part B-10 of the ECL for steam turbines. The appeals challenge only the Executive Director's determinations granting 100% Tier IV positive use determinations for the HRSGs. The Executive Director's determinations regarding the steam turbines were not appealed.

Since the enactment of HB 3732, the Executive Director has received approximately thirty seven Tier IV use determination applications for HRSGs and steam turbines installed at combined-cycle electric generation facilities. The Executive Director has issued 100% positive use determinations for twenty six HRSGs. Six out of the twenty six use determinations were appealed by the affected appraisal districts, and all six are the subject of the instant appeals. There are currently eleven applications awaiting determinations.

Under TCEQ rules, an applicant for a Tier IV use determination is required to calculate the use determination for the equipment or categories of equipment included in the application. "It is the responsibility of the applicant to propose a reasonable method for determining the use determination percentage. It is the responsibility of the executive director to review the proposed method and make the final determination."[17] The challenge with most Tier IV applications including those involved in these appeals is the calculation of the use determination percentage for each category of equipment. A description of the functions performed by a HRSG will help explain why the calculation methodologies vary from one application to another.

A HRSG acts as a fuel substitute in a typical combined-cycle installation. A typical HRSG captures hot exhaust gases from a combustion turbine. The resulting heat is converted "into high pressure and temperature steam" which is used to propel a steam turbine to generate electrical energy.[18] This process eliminates the need for the additional burning of coal or other hydrocarbon based fuel in order to obtain the same increase in electrical energy generation output at the site. Installation of a HRSG in a combined-cycle facility "allows more electrical energy to be produced for a given heat input" compared to a "simple cycle or traditional steam boiler/turbine (Rankine cycle) configuration."[19]

Calculation Methodologies Provided in the Respective Applications:

Tenaska Gateway: Tenaska proposed a calculation based on comparing a single cycle plant with a selective catalytic reduction (SCR) system installed to control NO_x to a combined-cycle plant with an HRSG installed to boost efficiency with less NO_x emissions. Based on this premise, Tenaska claimed that it merely substituted a HRSG in a combined-cycle plant for an SCR in a single cycle plant. As a result, Tenaska wanted a use determination percentage that reflected the total capital cost of the hypothetical SCR that it did not install. The arithmetic and method of calculation is best expressed on pages 5-6 of the application.[20]

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[17] 30 TEX. ADMIN. CODE § 17.17(d).

[18] Yongjun Zhao, Hongmei Chen, Mark Waters, and Dimitri N. Mavris; "Modeling and Cost Optimization of Combined Cycle Heat Recovery Generator Systems" (Proceedings of ASME Turbo Expo 2003 - Power of Land, Sea, and Air, GT2003-38568, June 16-19, 2003). See also, Application for Use Determinations filed by Ennis-Tractebel Power Company, LP).

[19] Id. A single-cycle or simple-cycle power plant uses a "fuel-fired turbine" to generate electricity. A combined-cycle power plant combines "gas turbine engine" with a heat recovery steam generator and a steam turbine system to generate electricity. Single-cycle facilities are only able to utilize a portion of the heat that the combustion of their fuel generates. The excess heat generated from combustion is generally wasted in a single cycle facility. The HRSGs at combined-cycle facilities recapture that waste heat, and use it to make steam to generate electricity; thereby, improving overall efficiency. See Footnote 18 ("Modeling and Cost Optimization of Combined Cycle Heat Recovery Generator Systems").

[20] See ED's Exhibit 1 (Application for Tier IV use determination submitted by Tenaska Gateway Partners, Ltd.).

The problems with this calculation are as follows. First, the cost of the steam turbine which is not a pollution control property was factored into the calculation. Second, HRSGs and SCRs are totally different mechanisms. The latter is a known and acceptable pollution control device, which may still be installed somewhere in the plant to control pollution. Once installed, Tenaska can apply and receive a use determination for it. Third, SCRs are custom-built for each facility. Choosing and using an average cost, as Tenaska did, does not come close to reflecting the actual value of a SCR that would be installed if there was a need to install one. Fourth, the calculation removes the focus of the evaluation from the purported pollution control property, and places it on another unrelated property. The calculation is not based on the equipment for which use determination is sought. Finally, it is impossible to apply the review standards, particularly the Decision Flow Charts, using this calculation methodology.

Freeport Energy: Freeport requested a 98% partial use determination for replacing an old power generation plant with a combined-cycle plant using an HRSG. Freeport based its proposed calculation on the NO_x reduction achieved by the new plant. Freeport claimed that NO_x emissions were reduced from 147ppm (old plant) to 3ppm (new plant). The partial percentage calculation based on reduction in NO_x emissions was 98% of the total cost of installation of the HRSG, steam turbine, and condenser and ancillary pump system. The method of calculation is best expressed on pages 5-6 of the application.[21]

The problems with this calculation are as follows. First, the cost of the steam turbine, condenser and ancillary pump system which are not pollution control properties are factored into the calculation. Second, the calculation removes the focus of the evaluation from the purported pollution control equipment, and places it on NO_x emissions. The calculation is not based on the equipment for which use determination is sought. Third, the calculation is based on the cost of the entire facility rather than the cost of the HRSG. Finally, it is impossible to apply the review standards, particularly the Decision Flow Charts, using this calculation methodology.

Freestone Power Generation: Freestone proposed a use determination percentage calculation based on "avoided emissions." This "approach relies on thermal output differences between a conventional power generation system and the combined-cycle system."[22] This approach "utilized output-based NO_x allocation method for both power generation projects."[23] The method of calculation is best expressed on Schedule A, and pages 11-12 of the application.[24]

The problems with this calculation are as follows. First, the cost of the entire facility was used in the calculation. Second, the cost of the steam turbines and supporting systems which are not pollution control properties are factored into the calculation. Third, the calculation removes the focus of the evaluation from the purported pollution control property and places it on NO_x emissions output. The calculation is not based on the devices for which use determinations are sought. Fourth, the calculation is based on several assumptions, none of which reflect the pollution control properties at issue in this case. Finally, it is impossible to apply the review

[21] See ED's Exhibit 5 (Application for Tier IV use determination submitted by Freeport Energy Center, L.P.).
[22] See ED's Exhibit 2 (Application for Tier IV use determination submitted by Freestone Power Generation, L.P.).
[23] Id.
[24] Id.

standards, particularly the Decision Flow Charts, using this calculation methodology. Finally, as a result of the flawed assumptions, the use of the total cost of the facility, and the use of the total cost of the HRSGs and steam turbines, the applicant came up with a pollution control percentage of 384%.

Borger Energy: Like Freestone, Borger proposed a use determination percentage calculation based on "avoided emissions." This "approach relies on thermal output differences between a conventional power generation system and the combined-cycle system."[25] The approach "utilized output-based NO_x allocation method for both power generation projects."[26] The method of calculation is best expressed on Schedule A, and pages 7-9 of the application.[27]

The problems with this calculation are as follows. First, the cost of the entire facility was used in the calculation. Second, the calculation removes the focus of the evaluation from the purported pollution control properties and places it on NO_x emissions output. The calculation is not based on the devices for which use determinations are sought. Third, the calculation is based on several assumptions, none of which reflect the pollution control properties at issue in this case. Fourth, it is impossible to apply the review standards, particularly the Decision Flow Charts, using this calculation methodology. Finally, as a result of the flawed assumptions and the use of the total cost of the facility, the applicant came up with a pollution control percentage of 128.6%.

Brazos Valley Energy: Brazos proposed a pollution control percentage calculation based on "avoided emissions." This "approach relies on thermal output differences between a conventional power generation system and the combined-cycle system."[28] The approach "utilized output-based NOx allocation method for both power generation projects."[29] The method of calculation is best expressed on Schedule A, and pages 9-10 of the application.[30]

The problems with this calculation are as follows. First, the cost of the entire facility was used in the calculation. Second, the cost of the steam turbines and supporting systems which are not pollution control devices are factored into the calculation. Third, the calculation removes the focus of the evaluation from the purported pollution control properties and places it on NOx emissions output. The calculation is not based on the devices for which use determinations are sought. Fourth, the calculation is based on several assumptions, none of which reflects the pollution control properties at issue in this case. Fifth, it is impossible to apply the review standards, particularly the Decision Flow Charts, using this calculation methodology. Finally, as a result of the flawed assumptions, the use of the total cost of the facility, and the use of the total cost of the HRSGs and steam turbine, the applicant came up with a pollution control percentage of 248.7%.

Navasota Energy: Navasota proposed a pollution control percentage calculation based on "avoided emissions." This "approach relies on thermal output differences between a

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[25] See ED's Exhibit 3 (Application for Tier IV use determination submitted by Borger Energy Associates, LP.).
[26] Id.
[27] Id.
[28] See ED's Exhibit 4 (Application for Tier IV use determination submitted by Brazos Valley Energy, L.P.).
[29] Id.
[30] Id.

conventional power generation system and the combined-cycle system."[31] The approach "utilized output-based NO_x allocation method for both power generation projects."[32] The method of calculation is best expressed on Schedule A, and pages 9-10 of the application.[33]

The problems with this calculation are as follows. First, the cost of the entire facility was used in the calculation. Second, the cost of the steam turbines and supporting systems which are not pollution control devices are factored into the calculation. Third, the calculation removes the focus of the evaluation from the purported pollution control properties and places it on NO_x emissions output. The calculation is not based on the devices for which use determinations are sought. Fourth, the calculation is based on several assumptions, none of which reflects the pollution control properties at issue in this case. Fifth, it is impossible to apply the review standards, particularly the Decision Flow Charts, using this calculation methodology. Finally, as a result of the flawed assumptions, the use of the total cost of the facility, and the use of the total cost of the HRSGs and steam turbine, the applicant came up with a pollution control percentage of 164%.

The pollution control percentages and the methods of calculation used by the applicants vary considerably. The following are examples of the percentages derived by using the avoided emissions calculation:

Applicant	Calculation Method	Pollution Control %
Channel Energy	Avoided emission based on No_x Output	366.1%
Pasadena Cogeneration	Avoided emission based on No_x Output	165%
TH Wharton	Avoided emission based on No_x Output	398.3%
Cedar Bayou 4	Avoided emission based on No_x Output	225.9%
Mustang Units 1, 2, &3	Avoided emission based on No_x Output	142.18%
Calpine Baytown	Avoided emission based on No_x Output	298.75%
Deer Park Energy	Avoided emission based on No_x Output	503.55%
Magic Valley	Avoided emission based on No_x Output	263.55%
FPL Forney	Avoided emission based on No_x Output	213.64%

Based on various calculations and initial research by staff, the Executive Director allowed 100% positive use determination for the first set of applications adjudicated. Subsequently, the Executive Director received new applications, with varying use determination percentages. The Executive Director then decided to develop a consistent and uniform use determination percentage for HRSGs.

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[31] See ED's Exhibit 6 (Application for Tier IV use determination submitted by Navasota Wharton Energy Partners, LP.).
[32] Id.
[33] Id.

IV.

THE WORKGROUP AND EXECUTIVE DIRECTOR'S RECOMMENDATION

Faced with the difficulties of coming up with a reasonable use determination percentage for HRSGs, the Executive Director assembled a Workgroup to gather information that would lead to the development of a uniform use determination percentage for the equipment. The Workgroup was attended by applicants or their representatives whose use determinations are currently pending on appeal; applicants or their representatives whose use determination applications are currently pending in-house; appraisal districts and their representatives; and environmental and public interest groups. The Workgroup met twice and provided input to the Executive Director on this issue. Based on staff research and input from the Workgroup, the following conclusions were made:

1. A comparable combined cycle power plant produces less air emissions than the same size simple cycle power plant. The reduced emissions are attributed to reduced combustion. The installation of the HRSGs lead to the reduced emissions.

2. The steam turbine systems are used solely to produce electricity. As 100% production equipment the steam turbine systems are not eligible for a positive use determination.

3. The pollution control aspect of the combined cycle plant relates solely to the installation of the HRSGs. However, installation of HRSG also results in increased efficiency and production gain.

The Executive Director reviewed several calculation methodologies provided in different applications and at the Workgroup meetings; calculations provided by Wayne Frazell, with Pritchard & Abbott; and comments and suggestions made by Workgroup participants. The goal was to assign an appropriate percentage to the pollution control aspect of the HRSGs, while taking into account the production gain associated with their installation. Of all the calculations reviewed, the method furnished by Cummings Westlake, LLC, representing Ennis-Tractebel Power Company, comes the closest to providing the appropriate use determination percentage for HRSGs.

The Executive Director is therefore recommending the following modified version of the calculation presented by Cummings Westlake:

> A HRSG acts as a fuel substitute in a combined cycle installation. A typical HRSG captures hot exhaust gases from a combustion turbine. The resulting heat is converted "into high pressure and temperature steam" which is used to propel a steam turbine to generate electrical energy.[34] This process eliminates the need for the additional burning of coal or other hydrocarbon based fuel in order to obtain

[34] Yongjun Zhao, Hongmei Chen, Mark Waters, and Dimitri N. Mavris; "Modeling and Cost Optimization of Combined Cycle Heat Recovery Generator Systems" (Proceedings of ASME Turbo Expo 2003 - Power of Land, Sea, and Air, GT2003-38568, June 16-19, 2003). See also, Application for Use Determinations filed by Ennis-Tractebel Power Company, LP).

the same increase in electrical energy generation output at the site. Installation of a HRSG in a combined cycle facility "allows more electrical energy to be produced for a given heat input" compared to a "simple cycle or traditional steam boiler/turbine (Rankine cycle) configuration."[35] The thermal efficiency increase or production gain derived from the installation of a HRSG is approximately 39%. Since this percentage represents the additional amount of electrical energy produced for a given heat input, it therefore represents the production value of the equipment. Based on this production value, the pollution control percentage of a HRSG installed at a combined-cycle facility is 61%. **Staff is therefore recommending a positive use determination of 61% for the installation of a HRSG in a combined cycle facility.**

Under this method, a HRSG would exit the "Decision Flow Chart" at box 7 and requires the application of "Part B Decision Flow Chart."[36] HRSG provides environmental benefit at the site under box 2 of the Part B Decision Flow Chart by acting as fuel substitute, capturing exhaust gases which would have been emitted into the air at the site, and eliminates the need for the additional burning of hydrocarbon-based fuel to obtain the same increase in electrical energy generation at the site. The HRSGs involved in the instant appeals were installed in order to meet or exceed an environmental rule adopted to control NO_x emissions.[37]

V.

CONCLUSION

The Executive Director requests that the Commission adopt the recommendation of the Executive Director on the proper pollution control percentage for HRSGs installed at combined-cycle facilities. Should the Commission choose to adopt the Executive Director's recommendation, the Executive Director intends to apply the adopted recommendation to all subsequently filed similar use determination applications, and to those applications currently pending adjudication.

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[35] Id.
[36] 30 TEX. ADMIN. CODE § 17.15(a); and 30 TEX. ADMIN. CODE § 17.15(b).
[37] See 40 C.F.R § 60.44Da; and 30 TEX. ADMIN. CODE § 106.512.

The Executive Director respectfully requests that the Commission remand use determination numbers 07-1194, 07-11966, 07-11971, 07-11969, 07-11994, and 07-11926, to the Executive Director to issue revised use determinations consistent with the adopted recommendation.

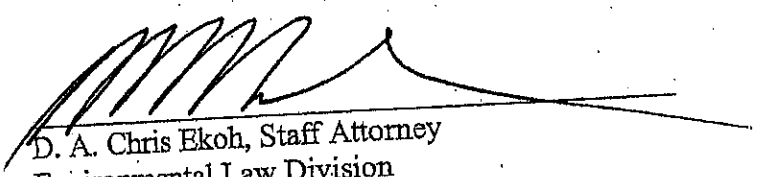
Respectfully submitted,

TEXAS COMMISSION ON ENVIRONMENTAL QUALAITY

Mark R. Vickery, P.G., Executive Director

Stephanie Bergeron Perdue,
Deputy Director Office of Legal Services

Robert Martinez, Director
Environmental Law Division



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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CERTIFICATE OF SERVICE

I certify that on December 3, 2008, the original and 7 copies of the Executive Director's Response to Rusk County, Freestone Central, Hutchinson County, Fort Bend Central, Brazoria County, and Wharton County Appraisal Districts' Appeals of the Executive Director's use determinations was filed with the Office of the Chief Clerk, Texas Commission on Environmental Quality, and was served by first-class mail, agency mail, or facsimile to all persons on the attached mailing list.

D. A. Chris Ekoh, Staff Attorney
Environmental Law Division
Texas Commission on Environmental Quality

MAILING LIST
TCEQ Docket Numbers
2008-0830-MIS-U (UD 07-11914/Tenaska Gateway Partners, Ltd – Rusk County)
2008-0831-MIS-U (UD 07-11966/Freestone Power Generation, L.P. – Freestone County)
2008-0832-MIS-U (UD 07-11971/Borger Energy Associates, LP – Hutchinson County)
2008-0849-MIS-U (UD 07-11969/Brazos Valley Energy, L.P. – Fort Bend County)
2008-0850-MIS-U (UD 07-11994/Freeport Energy Center, L.P. – Brazoria County)
2008-0851-MIS-U (UD 07-11926/Navasota Wharton Energy Partners, LP – Wharton County)

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Attachment E

February 23, 2009

LaDonna Castañuela, Chief Clerk
TCEQ Office of Chief Clerk MC-105
P.O. Box 13087
Austin, Texas 78711-3087

Re: TCEQ Docket Nos. 2008-0830-MIS-U (UD No. 07-11914/Tenaska Gateway Partners, Ltd.— Rusk County Appraisal District), 2008-0831-MIS-U (UD No. 07-11966/Freestone Power Generation, L.P.— Freestone Central Appraisal District), 2008-0832-MIS-U (UD No. 07-11971/Borger Energy Associates, L.P.— Hutchinson County Appraisal District), 2008-0849-MIS-U (UD No. 07-11969/ Brazos Valley Energy, L.P.— Fort Bend Central Appraisal District), 2008-0850-MIS-U (UD No. 07-11994/Freeport Energy Center, L.P.— Brazoria County Appraisal District), 2008-0851-MIS-U (UD No. 07-11926/Navasota Wharton Energy Partners, L.P.— Wharton County Appraisal District).
Executive Director's Motion for Continuance

Dear Ms. Castañuela:

Enclosed for filing, please find a copy of the *"Executive Director's Motion for Continuance"* regarding the above referenced use determination appeals. If you have any questions, please do not hesitate to contact me at (512) 239-0969.

Sincerely,

Timothy J. Reidy
Staff Attorney
Environmental Law Division

TCEQ Docket Numbers
2008-0830-MIS-U (UD 07-11914/Tenaska Gateway Partners, Ltd. – Rusk County)
2008-0831-MIS-U (UD 07-11966/Freestone Power Generation, L.P. – Freestone County)
2008-0832-MIS-U (UD 07-11971/Borger Energy Associates, L.P. – Hutchinson County)
2008-0849-MIS-U (UD 07-11969/Brazos Valley Energy, L.P. – Fort Bend County)
2008-0850-MIS-U (UD 07-11994/Freeport Energy Center, L.P. – Brazoria County)
2008-0851-MIS-U (UD 07-11926/Navasota Wharton Energy Partners, L.P. – Wharton County)

APPEAL OF THE EXECUTIVE DIRECTOR'S USE DETERMINATIONS ISSUED TO TENASKA GATEWAY PARTNERS, LTD.; FREESTONE POWER GENERATION, L.P.; BORGER ENERGY ASSOCIATES, L.P.; BRAZOS VALLEY ENERGY, L.P.; FREEPORT ENERGY CENTER, L.P.; and NAVASOTA WHARTON ENERGY PARTNERS, L.P.	§	**BEFORE THE**
	§	**TEXAS COMMISSION ON**
	§	**ENVIRONMENTAL QUALITY**

EXECUTIVE DIRECTOR'S MOTION FOR CONTINUANCE

TO THE GENERAL COUNSEL OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

The Commission is scheduled to consider the above referenced use determination appeals at its February 25, 2009 agenda meeting. The Executive Director respectfully requests that, pursuant to Section 10.4(b) of Title 30 of the Texas Administrative Code, the Commission continue its consideration of these matters to allow the Executive Director more time to evaluate its current recommendation. The Executive Director has conferred with all parties, and none of the parties oppose this motion.

Respectfully submitted,
Texas Commission on Environmental Quality

Mark R. Vickery, P.G.
Executive Director

Robert Martinez, Director
Environmental Law Division

By _____
Timothy J. Reidy, Staff Attorney
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REPRESENTING THE EXECUTIVE DIRECTOR OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CERTIFICATE OF SERVICE

I certify that on February 23, 2009, a copy of the "Executive Director's Motion for Continuance" was filed with the Texas Commission on Environmental Quality's Office of the Chief Clerk, and was sent by hand delivery, first-class mail, or facsimile to all persons on the attached mailing list.

Timothy J. Reidy, Staff Attorney
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Attachment F

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

February 23, 2009

To: Persons on the attached Mailing List (By mail, and facsimile as indicated)

Re: Appeals of the Executive Director's Use Determinations regarding Tenaska Gateway Partners, Ltd. (Rusk County), Freestone Power Generation LP (Freestone County), Borger Energy Associates, LP (Hutchinson County), Brazos Valley Energy L.P. (Fort Bend County), Freeport Energy Center, L.P. (Brazoria County), and Navasota Wharton Energy Partners LP (Wharton County), TCEQ Use Determination Nos. 07-11914, 07-11966, 07-11971, 07-11969, 07-11994 and 07-11926; TCEQ Docket Nos. 2008-0830-MIS-U, 2008-0831-MIS-U, 2008-0832-MIS-U, 2008-0849-MIS-U, 2008-0850-MIS-U, and 2008-0851-MIS-U

The above-named matters are currently scheduled to be considered by the Texas Commission on Environmental Quality ("TCEQ") at its February 25, 2009, public meeting. The TCEQ Executive Director (ED) filed a *Motion for Continuance* (ED's Motion) on February 23, 2009. The ED's Motion asks that the Commission continue its consideration of these above-named matters to allow the ED more time to evaluate its current recommendation. The ED states that none of the parties oppose the ED's Motion.

Pursuant to the ED's Motion, the Office of General Counsel has determined to continue the matter from the February 25, 2009 meeting. Accordingly, this matter is continued indefinitely pursuant to 30 TAC § 10.4. The Office of General Counsel will notify the parties by subsequent letter of the future agenda setting and any associated filing deadlines.

If you have any questions regarding this matter, please contact John Sedberry, Assistant General Counsel, at 512-239-6575.

Respectfully,

Les Trobman
General Counsel

Mailing List

Mailing List

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TCEQ Docket Nos. 2008-0830-MIS-U, 2008-0831-MIS-U, 2008-0832-MIS-U, 2008-0849-MIS-U, 2008-0850-MIS-U, and 2008-0851-MIS-U

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Attachment G

TCEQ Docket Numbers
2008-0830-MIS-U (UD 07-11914/Tenaska Gateway Partners, Ltd – Rusk County)
2008-0831-MIS-U (UD 07-11966/Freestone Power Generation, L.P. – Freestone County)
2008-0832-MIS-U (UD 07-11971/Borger Energy Associates, L.P. – Hutchinson County)
2008-0849-MIS-U (UD 07-11969/Brazos Valley Energy, L.P. – Fort Bend County)
2008-0850-MIS-U (UD 07-11994/Freeport Energy Center, L.P. – Brazoria County)
2008-0851-MIS-U (UD 07-11926/Navasota Wharton Energy Partners, L.P. – Wharton County)

Appeal of Executive Director's Use Determination Issue to Tenaska Gateway Partners, Ltd; Freestone Power Generation, L.P.; Borger Energy Associates, L.P.; Brazos Valley Energy, L.P.; Freeport Energy Center, L.P.; and Navasota Wharton Energy Partners, L.P	§	Before the Texas Commission on Environmental Quality

Executive Director's Request for Remand of Applications Submitted by Tenaska Gateway Partners, Ltd; Freestone Power Generation, L.P.; Borger Energy Associates, L.P.; Brazos Valley Energy, L.P.; Freeport Energy Center, L.P.; and Navasota Wharton Energy Partners, L.P.

Pursuant to 30 TAC § 17.25(d), the Executive Director of the Texas Commission on Environmental Quality requests that the General Council remand the above listed applications for further processing.

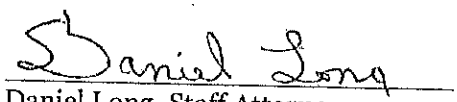
Respectfully submitted,

Texas Commission on Environmental Quality

Zak Covar
Executive Director

Caroline Sweeney, Deputy Director
Office of Legal Services

Robert Martinez, Director
Environmental Law Division



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CERTIFICATE OF SERVICE

I certify that on June 18, 2012, the original and 7 copies of the Executive Director's Request for Remand of Applications Submitted by Tenaska Gateway Partners, Ltd; Freestone Power Generation, L.P.; Borger Energy Associates, L.P.; Brazos Valley Energy, L.P.; Freeport Energy Center, L.P.; and Navasota Wharton Energy Partners, L.P. was filed with the Office of the Chief Clerk, Texas Commission on Environmental Quality, and was served by first-class mail, agency mail, electronic mail, or facsimile to all persons on the attached mailing list.

Daniel Long

Daniel Long, Staff Attorney
Environmental Law Division
Texas Commission on Environmental Quality

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TCEQ Docket Numbers
2008-0830-MIS-U (UD 07-11914/Tenaska Gateway Partners, Ltd – Rusk County)
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2008-0851-MIS-U (UD 07-11926/Navasota Wharton Energy Partners, L.P. – Wharton County)

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Attachment H

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

June 29, 2012

To: Persons on the attached service list (by mail and facsimile as indicated)

Re: Request for remand of Prop 2 Use Determination Application Nos. 07-11914, 07-11966, 07-11971, 07-11969, 07-11994, and 07-11926 submitted under TCEQ Docket Nos. 2008-0830-MIS-U; 2008-0831-MIS-U; 2008-0832-MIS-U; 2008-0849-MIS-U; 2008-0850-MIS-U; and 2008-0851-MIS-U.

On June 18, 2012, the Executive Director (ED) filed a request (served on each of the parties for the respective use determination appeals) under 30 TAC § 17.25(d) for remand of the following use determination applications for further processing:

- Application No. 07-11914, Tenaska Gateway Partners, Ltd, Rusk County (TCEQ Docket No. 2008-0830-MIS-U);
- Application No. 07-11966, Freestone Power Generation, L.P., Freestone County (TCEQ Docket No. 2008-0831-MIS-U);
- Application No. 07-11971, Borger Energy Associates, L.P., Hutchinson County (TCEQ Docket No. 2008-0832-MIS-U);
- Application No. 07-11969, Brazos Valley Energy Center, L.P., Fort Bend County (TCEQ Docket No. 2008-0849-MIS-U);
- Application No. 07-11994, Freeport Energy Center, L.P., Brazoria County (TCEQ Docket No. 2008-0850-MIS-U); and
- Application No. 07-11926, Navasota Wharton Energy Partners, L.P., Wharton County (TCEQ Docket No. 2008-0851-MIS-U).

Section 17.25(d) provides that "the general counsel may remand a matter from the commission's agenda to the executive director if the executive director ... requests a remand." Pursuant to 30 TAC § 17.25(d), this letter grants the ED's request to remand the above-listed applications to the ED for further processing. The General Counsel notes that any revised use determination that may subsequently be issued by the ED will be subject to the appeals process set forth in § 17.25 of the Commission's rules.

If you have any questions about this matter, please contact Jim Rizk, Assistant General Counsel, at 512/239-5530.

Very truly yours,

Les Trobman
General Counsel

Mailing List

Mailing List
Prop 2 Use Determination Application
Nos. 07-11914, 07-11966, 07-11971, 07-11969, 07-11994, and 07-11926
TCEQ Docket Nos. 2008-0830-MIS-U; 2008-0831-MIS-U; 2008-0832-MIS-U;
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Attachment I

TCEQ DOCKET NO. 2008-0851-MIS-U

APPEAL OF THE EXECUTIVE DIRECTOR'S POSITIVE USE DETERMINATION ISSUED TO NAVASOTA WHARTON ENERGY PARTNERS LP (07-11926)	§ § § § §	TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

APPLICANT CER-COLORADO BEND ENERGY LLC'S REQUEST FOR REVERSAL OF THE REMAND OF THE POSITIVE USE DETERMINATION ISSUED TO NAVASOTA WHARTON ENERGY PARTNERS LP

CER-Colorado Bend Energy LLC (formerly known as Navasota Wharton Energy Partners LP) ("Applicant") files this Request for Reversal of the Texas Commission on Environmental Quality ("TCEQ" or "Commission") General Counsel's June 29, 2012 remand of the positive use determination issued by the Executive Director to the Applicant on May 1, 2008. For the reasons articulated below, the Applicant respectfully requests that the Commission reverse the General Counsel's decision to remand the May 1, 2008 positive use determination to the Executive Director and take up for the first time the previously pending appeal of that Positive Use Determination consistent with the requirements of Section 11.31(e) of the Texas Tax Code

Part I of this brief provides a short background of the Pollution Control Property Program; Part II illustrates the irregular procedural background of the application and subsequent appeal; and Part III details the Applicant's argument why the General Counsel's remand of the matter was not lawful under the applicable provisions of the Texas Tax Code. To preserve its rights under applicable law, Applicant is filing under separate cover an appeal of the Negative Use Determination sent on July 10, 2012. However, because Applicant believes that its prior positive use determination was not properly disposed of on appeal, we file this Request for Reversal.

I. Program Background

On November 2, 1993, Texans approved Proposition 2 amending the Texas Constitution to provide tax relief for pollution control property. This amendment added §1-l to the Texas Constitution, Article VIII, which states:

> (a) The legislature by general law may exempt from ad valorem taxation all or part of real and personal property used, constructed, acquired, or installed wholly or partly to meet or exceed rules or regulations adopted by any environmental protection agency of the United States, this state, or a political subdivision of this state for the prevention, monitoring, control, or reduction of air, water, or land pollution.

(b) This section applies to real and personal property used as a facility, device, or method for the control of air, water, or land pollution that would otherwise be taxable for the first time on or after January 1, 1994.

In response to the constitutional amendment, the Texas Legislature added Texas Tax Code, §11.31, Pollution Control Property ("§11.31"). The statute establishes a process where applicants submit Applications for Use Determination to the Executive Director of the TCEQ to determine whether the property is used wholly or in part for pollution control. The Executive Director's role is limited by § 11.31 to the specific task of conducting a technical evaluation to determine whether the equipment is used wholly or partly for the control of air, water, or land pollution, and does not include any evaluation of the merit of the tax exemption itself or tax policy implications of granting positive or negative use determinations.

In 2001, the Legislature passed House Bill 3121, which amended §11.31. These amendments included providing a process for appealing the Executive Director's use determinations. House Bill 3121 also required the Commission to adopt rules that establish specific standards for the review of applications that ensure determinations are equal and uniform, and to adopt rules to distinguish the proportion of property that is used to control pollution from the proportion that is used to produce goods or services.

In 2007, §11.31 was amended again with the passage of House Bill 3732, which required the Commission to adopt a list of equipment that is considered pollution control property, including the equipment listed in §11.31(k). In adopting rules for the implementation of House Bill 3732, the TCEQ created a Tier IV application for the categories of listed equipment. For Tier IV applications, the Executive Director must determine the proportion of the equipment used for pollution control and the proportion that is used for production. The application that is the subject of this appeal is a Tier IV application.

II. Brief Procedural Background

On March 19, 2008, the Applicant filed a Tier IV Application for Use Determination for Pollution Control Property with the Executive Director for four Heat Recovery Steam Generators ("HRSGs") and two steam turbines (See Attachment A). The Executive Director conducted a technical review of the application and on May 1, 2008 issued a 100 percent positive use determination for the four HRSGs, stating that "[t]his equipment is considered to be pollution control equipment and was installed to meet or exceed federal or state regulations." (See Attachment B). Subsequently, on May 19, 2008, Wharton County Appraisal District filed an appeal of the Executive Director's use determination, claiming that the HRSGs "are production equipment in that they burn natural gas to create steam to generate electricity." (See Attachment C).

The Executive Director has received approximately thirty-eight similar applications for HRSGs and steam turbines installed at combined-cycle electric generation facilities. The Executive Director issued 100 percent positive use determinations for twenty-six of the HRSG applications. Of the twenty-six positive use determinations, six were appealed by appraisal districts.

The appeal of the May 1, 2008 positive use determination and the five other similarly situated positive use determinations were scheduled to appear on the Commission's Agenda to be held on February 25, 2009. However, on February 23, 2009, two days prior to the Agenda, the Executive Director filed with the TCEQ's General Counsel a Motion for Continuance to "allow the Executive Director more time to evaluate its current recommendation." (See Attachment D). In response to the Executive Director's motion, the General Counsel chose to continue the matter "indefinitely." (See Attachment E).

On June 18, 2012, almost three and a half years after the Commission indefinitely continued the matter on its Agenda, the Executive Director requested that the General Counsel remand the six appealed used determinations back to the Executive Director for "further processing." (See Attachment F). On June 29, 2012, before the Commission had taken up the original appeal of the positive use determination, the General Counsel remanded the matter back to the Executive Director. (See Attachment G). In less than two weeks, on July 10, 2012, the Executive Director issued a new use determination, stating that "[h]eat recovery steam generators are used solely for production and, therefore, are not eligible for a positive use determination." (See Attachment H).

III. Basis for Reversal of Remand

1. The General Counsel's Remand of the Use Determination is a Violation of the Statutory Provisions of Texas Tax Code § 11.31.

Texas Tax Code § 11.31(e) outlines a unique appeals process for a person challenging use determinations made by the TCEQ's Executive Director. This appeals process is unlike any other procedure for appealing a TCEQ decision and includes a specific sequence of administrative steps the agency must follow in considering and processing those appeals. After describing the requirements for filing an appeal, Section 11.31(e) states that "[t]he commission shall consider the appeal at the next regularly scheduled meeting of the commission for which adequate notice may be given." (emphasis added). This section is unambiguous and leaves no doubt that the Commission must consider any use determinations made by the Executive Director at the next possible Agenda, unless adequate notice of the appeal cannot be given. The Commission's rules also state that the Chief Clerk "shall schedule the appeal for consideration at the next regularly scheduled commission meeting for which adequate notice can be given." (30 TAC §17.25(c)(3)).

Section 11.31(e) adds that "[t]he Commission may remand the matter to the executive director for a new determination or deny the appeal and affirm the executive director's determination." Thus the Commission is not only required to consider the matter at the next Agenda meeting, but the Commission must vote to determine whether to affirm the appeal and remand the matter to the Executive Director or deny the appeal and affirm the original use determination. These two courses of action are the only two the Commission may take and the statute does allow for either of them to be delegated to the General Counsel.

The General Counsel's letter remanding the matter back to the Executive Director indicates that it is authorized to remand the letter to the Executive Director under 30 TAC §

17.25(d). Such an application of Section 17.25(d) in this case contradicts the plain language of the Texas Tax Code.

It is evident that there is a direct conflict between the provisions of Texas Tax Code § 11.31(e) and the General Counsel's use of 30 TAC § 17.25(d) in this case. One undisputed premise of administrative law is that a rule promulgated by a state agency must be consistent with the statutory provisions authorizing the agency to adopt rules to implement the statute. Under Texas Tax Code § 11.31(e), there is only one possible way that a use determination can be remanded back to the Executive Director after an appeal - the Commission must consider the matter at an Agenda meeting and vote to either 1) deny the appeal and approve the use determination or 2) remand the matter to the Executive Director.

The General Counse relied on Section 17.25(d) to remand the May 1, 2008 use determination to the Executive Director upon the Executive Director's request without any process before the Commissioners. This functionally made the General Counsel, instead of the Commissioners, the arbiter of whether Wharton County Appraisal District's appeal was granted. Just as it would have been inappropriate for the General Counsel to deny that appeal, it was inappropriate for him to grant it, which is what he did when he remanded the May 1, 2008 positive use determination.

2. By Remanding the Use Determination Under 30 TAC 17.25(d), the General Counsel Retroactively Applied an Agency Rule to an Application that was Submitted Before 30 TAC § 17.25(d) was Adopted.

As discussed above, the Tax Code mandates that the Commissioners, not the General Counsel, act on pending appeals of use determinations. However, even if 30 TAC § 17.25(d) could be applied as the General Counsel applied it here without violating the Tax Code, the General Counsel's reliance on the rule is an impermissible retroactive application of a rule that impacts substantive rights.

30 TAC § 17.25(d) was not adopted until December 13, 2010. Thus, the section of the Administrative Code upon which the General Counsel relies upon in support of the June 29 Remand was not effective until after Navasota submitted its Application for Use Determination, after the Executive Director issued its 100 percent use determination, and after the Wharton County Appraisal District appealed that use determination. In fact, Section 17.25(d) was not added to the Administrative Code until after the General Counsel indefinitely continued the matter before the Commission.

Under Texas law, the retroactive application of statutes and rules is strongly disfavored. Article 1, Section 16 of the Texas Constitution specifically prohibits retroactive laws. Texas Government Code § 311.022 states that a "statute is presumed to be prospective in its operation unless expressly made retrospective." The same general principles apply for agency rules.[1]

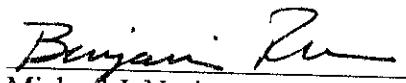
[1] *See R.R. Comm'n v. Lone Star Gas Co.*, 656 S.W.2d 421, 425 (Tex. 1983).

Although the retroactive application of rules is considered permissible under Texas law when only procedural rights are affected, much more is at stake here. In this case, the Applicant is entitled to a statutorily-mandated process that is designed to protect substantive rights stemming from the underlying use determination. The financial consequences of losing a positive use determination are significant, especially on equipment as valuable as involved in this case. Rather than being able to financially plan based on a timely disposition of the May 19, 2008 appeal, Applicant was left in limbo for over four years and then, in a matter of a few days, was stripped of its 100 percent positive use determination and handed a complete reversal without any involvement of the one body the Tax Code charges with ruling on appeals - the Commissioners. The effect of the retroactive application of this so-called procedural rule is far too substantive to withstand scrutiny.

IV. Conclusion

Based on the reasons articulated above, the General Counsel's decision to remand the May 1, 2008 positive use determination violated Texas Tax Code § 11.31. The Tax Code requires the Commission to consider appeals of use determinations and does not permit them to delegate that important role to the General Counsel. The rule relied upon by the General Counsel to justify the June 29, 2012 remand not only conflicts with the Tax Code, but cannot be retroactively applied in the manner proposed given the substantive impact of that application. Applicant request that the Remand be reversed and for the Commission to consider the original positive use determination as required by the Tax Code.

Respectfully submitted,



Michael J. Nasi
State Bar No. 00791335
Steve Moore
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JACKSON WALKER L.L.P.
100 Congress Avenue, Suite 1100
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512-236-2002 (Facsimile)
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ATTORNEYS FOR CER-COLORADO BEND ENERGY LLC

CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of July, 2012, a copy of the foregoing was provided by hand delivery, electronic mail or U.S. First Class Mail to the attached mailing list:

for Michael J. Nasi

Mailing List
Prop 2 Use Determination Application No. 07-11926
TCEQ Docket No. 2008-0851-MIS-U

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Wharton County Appraisal District
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Attachment A

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
APPLICATION FOR USE DETERMINATION
FOR POLLUTION CONTROL PROPERTY

The TCEQ has the responsibility to determine whether a property is a pollution control property. A person seeking a use determination for pollution control property must complete the attached application or use a copy or similar reproduction. For assistance in completing this form refer to the TCEQ guidelines document, *Property Tax Exemptions for Pollution Control Property*, as well as 30 TAC §17, rules governing this program. For additional assistance please contact the Tax Relief for Pollution Control Property Program at (512) 239-3100. The application should be completed and mailed, along with a complete copy and appropriate fee, to: TCEQ MC-214, Cashiers Office, P.O. Box 13088, Austin, Texas 78711-3088.

1. GENERAL INFORMATION

A. What is the type of ownership of this facility?

- ☐ Corporation
- ☐ Partnership
- ☑ Limited Partnership
- ☐ Sole Proprietor
- ☐ Utility
- ☐ Other

B. Size of company: Number of Employees

- ☑ 1 to 99
- ☐ 100 to 499
- ☐ 500 to 999
- ☐ 1,000 to 1,999
- ☐ 2,000 to 4,999
- ☐ 5,000 or more

C. Business Description: **Electricity Manufacturing (SIC 4911)**

2. TYPE OF APPLICATION

- ☐ **Tier I $150 Application Fee**
- ☐ **Tier II $1,000 Application Fee**
- ☐ **Tier III $2,500 Application Fee**
- ☑ **Tier IV $500 Application Fee**

NOTE: Enclose a check, money order to the TCEQ, or a copy of the ePay receipt along with the applicaton to cover the required fee.

3. NAME OF APPLICANT

A. Company Name: Navasota Wharton Energy Partners LP

B. Mailing Address (Street or P.O. Box): 403 Corporate Woods

C. City, State, ZIP: Magnolia, TX 77354

4. PHYSICAL LOCATION OF PROPERTY REQUESTING A TAX EXEMPTION

A. Name of facility: Colorado Bend

B. Type of Mfg Process or Service: Electricity Manufacturing (SIC 4911)

C. Street Address: 3821 S. State Hwy 60

D. City, State, ZIP: Wharton, TX 77488

E. Tracking Number Assigned by Applicant: DPCOBend B

F. Customer Number or Regulated Entity Number: N/A

5. APPRAISAL DISTRICT WITH TAXING AUTHORITY OVER PROPERTY

A. Name of Appraisal District: Wharton

B. Appraisal District Account Number: 10258-000-000-00; 10-20500000-0200-67099; 20063-000-055-00

Replacement
~~07-12209~~
07-11926

6. CONTACT NAME (must be provided)

A. Company/Organization Name:	Duff and Phelps LLC	
B. Name of Individual to Contact:	Greg Maxim	
C. Mailing Address:	919 Congress Ave.	Suite 1450
D. City, State, ZIP:	Austin, TX 78701	
E. Telephone number and fax number:	(512) 671-5580	Fax (512) 671-5501
F. E-Mail address (if available):	gregory.maxim@duffandphelps.com	

7. RELEVANT RULE, REGULATION, OR STATUTORY PROVISION

Please reference Section 8. Each item is detailed with the proper statute, regulation, or environmental regulatory provision.

8. DESCRIPTION OF PROPERTY

Background

The Colorado Bend Energy Center (the "Facility"), owned by Navasota Wharton Energy Partners LP, is a combined cycle natural-gas fired power plant located in Wharton, Wharton County, Texas. The Facility is intended to have a total capacity of 825 Mw, built in three phases. Phase has a capacity of 275 Mw and was completed in June of 2007. Phase 2, currently under construction, is to be completed in June of 2008 and will also have a 275 Mw capacity. Each phase consists of 2 GE 7-EA combustion turbine units utilizing the GE Dry Low NOx combustion control system technology, 2 heat recovery steam generating (HRSG) units, and one steam turbine unit. The Facility utilizes a cooling tower within the circulating water system for condenser cooling water needs and condensate return purposes.

Overview of Combined Cycle Technology

The Facility consists of a combined-cycle gas turbine power plant with gas Combustion Turbines ("CTs") equipped with heat recovery steam generators to capture heat from the gas turbine exhaust. Steam produced in the heat recovery steam generators powers a steam turbine generator(s) to produce additional electric power. Use of the otherwise wasted heat in the turbine exhaust gas results in higher plant thermal efficiency compared to other combustion technologies. Combined-cycle plants currently entering service can convert approximately 50% of the chemical energy of natural gas into electricity (HHV basis).

The Rankine cycle is a thermodynamic cycle that converts heat from an external source into work. In a Rankine cycle, external heat from an outside source is provided to a fluid in a closed-loop system. This fluid, once pressurized, converts the heat into work output using a turbine. The fluid most often used in a Rankine cycle is water (steam) due to its favorable properties, such as nontoxic and unreactive chemistry, abundance, and low cost, as well as its thermodynamic properties. The thermal efficiency of a Rankine cycle is usually limited by the working fluid. Without pressure reaching super critical the temperature range the

Rankine cycle can operate over is quite small, turbine entry temperatures are typically 565°C (the creep limit of stainless steel) and condenser temperatures are around 30°C. This gives a theoretical Carnot efficiency of around 63% compared with an actual efficiency of 42% for a modern coal-fired power station. This low turbine entry temperature (compared with a gas turbine) is why the Rankine cycle is often used as a bottoming cycle in combined cycle gas turbine power stations.

The Brayton cycle is a constant pressure thermodynamic cycle that converts heat from combustion into work. A Brayton engine, as it applies to a gas turbine system, will consist of a fuel or gas compressor, combustion chamber, and an expansion turbine. Air is drawn into the compressor, mixed with the fuel, and ignited. The resulting work output is captured through a pump, cylinder, or turbine. A Brayton engine forms half of a combined cycle system, which combines with a Rankine engine to further increase overall efficiency. Cogeneration systems typically make use of the waste heat from Brayton engines, typically for hot water production or space heating.

By combining both gas and steam cycles, high input temperatures and low output temperatures can be achieved. The efficiency of the cycles are additive, because they are powered by the same fuel source. A combined-cycle plant has a thermodynamic cycle that operates between the gas turbine's high firing temperature and the waste heat temperature from the condensers of the steam cycle. This large range means that the Carnot efficiency of the cycle is high. The actual efficiency, while lower than this is still higher than that of either plant on its own. The thermal efficiency of a combined-cycle power plant is the net power output of the plant divided by the heating value of the fuel. If the plant produces only electricity, efficiencies of up to 59% can be achieved.

A single-train combined-cycle plant consists of one gas turbine generator, a heat recovery steam generator (HSRG) and a steam turbine generator ("1 x 1" configuration). As an example, an "FA-class" combustion turbine, the most common technology in use for large combined-cycle plants within the state of Texas and other locations throughout the United States, represents a plant with approximately 270 megawatts of capacity.

See Figure 1 – Standard Combined-Cycle Configuration, below.

It is common to find combined-cycle plants using two or even three gas turbine generators and heat recovery steam generators feeding a single, proportionally larger steam turbine generator. Larger plant sizes result in economies of scale for construction and operation, and designs using multiple combustion turbines provide improved part-load efficiency. A 2 x 1 configuration using FA-class technology will produce about 540 megawatts of capacity at International Organization for Standardization ("ISO") conditions. ISO references ambient conditions at 14.7 psia, 59 F, and 60% relative humidity.

Because of high thermal efficiency, high reliability, and low air emissions,

combined-cycle gas turbines have been the new resource of choice for bulk power generation for well over a decade. Other attractive features include significant operational flexibility, the availability of relatively inexpensive power augmentation for peak period operation and relatively low carbon dioxide production.

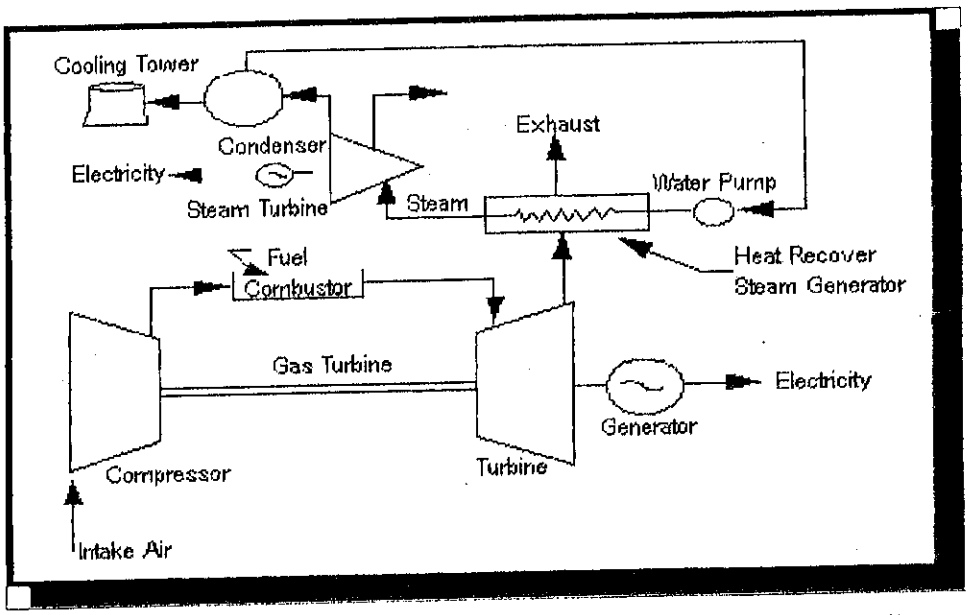

FIGURE 1 - Standard Combined-Cycle Configuration (1)

As an example, consider a gas turbine cycle that has an efficiency of 40%, which is a representative value for current Brayton Cycle gas turbines, and the Rankine Cycle has an efficiency of 30%. The combined-cycle efficiency would be 58%, which is a very large increase over either of the two simple cycles. Some representative efficiencies and power outputs for different cycles are shown in Figure 2 – Comparison of Efficiency and Power Output of Various Power Products, below.

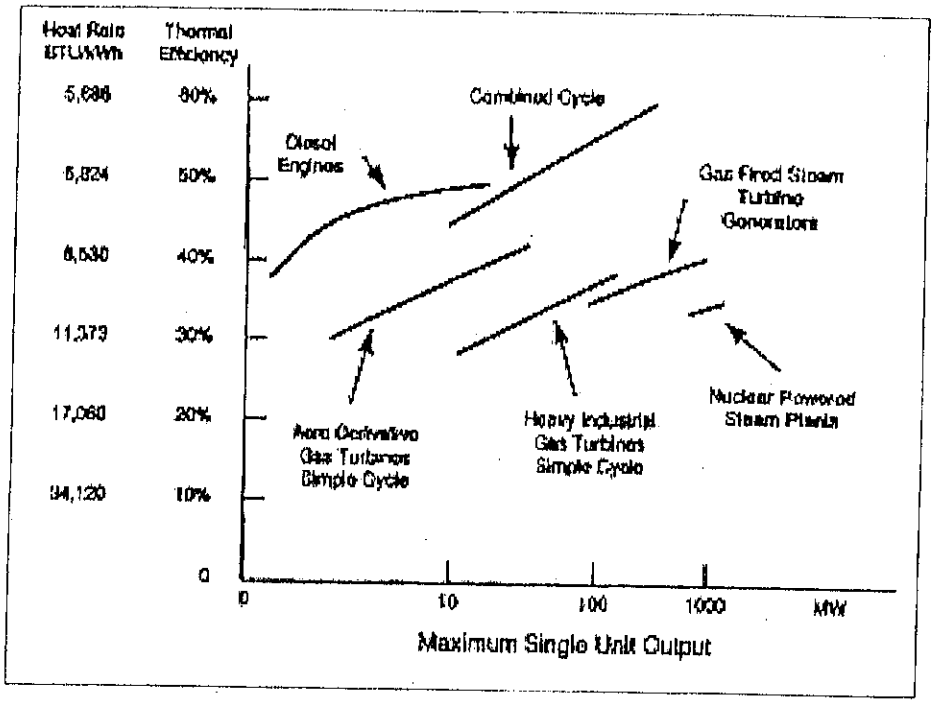

FIGURE 2 - Comparison of efficiency and power output of various power products [Bartol (1997)] (2)

Current Regulatory Authority for Output-Based Emissions

Innovative power technologies such as combined-cycle technology offer enormous potential to improve efficiency and enhance the environmental footprint of power generation through the reduction and/or prevention of air emissions to the environment. Currently, two thirds of the fuel burned to generate electricity in traditional fossil-fired steam boilers is lost. Traditional U.S. power generation facility efficiencies have not increased since the 1950s and more than one fifth of the U.S. power plants are more than 50 years old. In addition, these facilities are the leading contributors to U.S. emissions of carbon dioxide, NOx, sulfur dioxide ("SO2"), and other contaminants into the air and water.

The ability to recognize and regulate the efficiency benefits of pollution reduction and/or prevention through the use of combined-cycle technology is achieved through the use of Output-Based emissions standards, incorporated since September 1998 within the U.S. EPA's new source performance standards ("NSPS") for NOx, from both new utility boilers and new industrial boilers. Pursuant to section 407(c) of the Clean Air Act in subpart Da (Electric Utility Steam Generating Units) and subpart Db (Industrial-Commercial-Institutional Steam Generating Units) of 40 CFR part 60, the U.S. EPA revised the NOx emissions limits for steam generating units for which construction, modification, or reconstruction commenced after July 9, 1997 (3). Output-Based regulations are also exemplified by those used in the U.S. EPA's NOx Cap and Trade Program for the NOx State Implementation Plan ("SIP") Call

of 1998, which uses units of measure such as lb/MWh generated or lb concentration ("ppm"), which relate to the emissions to the productive output – electrical generation of the process.(4)

The use of innovative technologies such as combined-cycle units reduces fossil fuel use and leads to multi-media reductions in the environmental impacts of the production, processing transportation, and combustion of fossil fuels. In addition, reducing fossil fuel combustion is a pollution prevention measure that reduces emissions of all products of combustion, not just the target pollutant (currently NOx) of a federal regulatory program.

Authority to Expand Pollution Control Equipment & Categories in Texas

Under Texas House Bill 3732 ("HB3732") enacted in 2007, Section 11.31 of the Texas Tax Code is amended to add certain plant equipment and systems to the current list of air, water, or land pollution control devices exempt from property taxation in Texas.

Specifically, the language reads as follows:

SECTION 4. Section 11.31, Tax Code, is amended by adding Subsections (k), (l), and (m) to read as follows:
(k) The Texas Commission on Environmental Quality shall adopt rules establishing a nonexclusive list of facilities, devices, or methods for the control of air, water, or land pollution, which must include:
(1) coal cleaning or refining facilities;
(2) atmospheric or pressurized and bubbling or circulating fluidized bed combustion systems and gasification fluidized bed combustion combined-cycle systems;
(3) ultra-supercritical pulverized coal boilers;
(4) flue gas recirculation components;
(5) syngas purification systems and gas-cleanup units;
(6) enhanced heat recovery systems;
(7) exhaust heat recovery boilers;
(8) heat recovery steam generators;
(9) superheaters and evaporators;
(10) enhanced steam turbine systems;
(11) methanation;
(12) coal combustion or gasification byproduct and coproduct handling, storage, or treatment facilities;
(13) biomass cofiring storage, distribution, and firing systems;
(14) coal cleaning or drying processes, such as coal drying/moisture reduction, air jigging, precombustion decarbonization, and coal flow balancing technology;
(15) oxy-fuel combustion technology, amine or chilled ammonia scrubbing, fuel or emission conversion through the use of catalysts, enhanced scrubbing technology, modified combustion technology such as chemical looping, and cryogenic technology;
(16) if the United States Environmental Protection Agency adopts a final rule or regulation regulating carbon dioxide as a pollutant, property that is used, constructed, acquired, or installed wholly or partly to capture carbon dioxide from an anthropogenic source in this state that is geologically sequestered in this state;
(17) fuel cells generating electricity using hydrogen derived from coal, biomass, petroleum coke, or solid waste; and
(18) any other equipment designed to prevent, capture, abate, or monitor nitrogen oxides, volatile organic compounds, particulate matter, mercury, carbon monoxide, or any criteria pollutant.
(l) The Texas Commission on Environmental Quality by rule shall update the list adopted under Subsection (k) at least once every three years. An item may be removed from the list if the commission finds compelling evidence to support the conclusion that the item does not provide pollution control benefits.
(m) Notwithstanding the other provisions of this section, if the facility, device, or method for the

control of air, water, or land pollution described in an application for an exemption under this section is a facility, device, or method included on the list adopted under Subsection (k), the executive director of the Texas Commission on Environmental Quality, not later than the 30th day after the date of receipt of the information required by Subsections (c)(2) and (3) and without regard to whether the information required by Subsection (c)(1) has been submitted, shall determine that the facility, device, or method described in the application is used wholly or partly as a facility, device, or method for the control of air, water, or land pollution and shall take the actions that are required by Subsection (d) in the event such a determination is made.

Under the TCEQ's recently updated "Tax Relief for Pollution Control Property – Application Instructions and Equipment and Categories List – Effective January 2008", the Equipment and Categories List - Part B ("ECL Part B") is a list of the pollution control property categories adopted and set forth in TTC Sec. 26.045(f). The taxpayer is to supply a pollution control percentage for the equipment listed in Part B via calculations demonstrating pollution control, prevention and/or reductions achieved by the listed equipment or systems.

The following property descriptions outline the environmental purpose, including the anticipated environmental benefit of pollution control additions considered under the Application Instructions' ECL Part B that have been constructed and placed into use at the Facility as of its placed-in-service date, or installed subsequent to in-service since 1994:

Property Descriptions

Item #1 & 3 Combined-Cycle Gas Turbine Plant Heat Recovery Steam Generator ("HRSG") and Support Systems Tier IV B-8

40 CFR Part 60 Subparts DA and DB, NOx Limits for Electric Utility Steam Generating Units and Industrial-Commercial-Institutional Steam Generating Units for New Source Performance Standards ("NSPS").

TAC Rule 106.512, Standard Permit for Electric Generating Units (EGU)

NOTE: Permits issued under Texas Clean Air Act's Health & Safety Code Sections 382.011, applies to all electric generating units that emit air contaminants, regardless of size, and it is to reflect Best Available Control Technology ("BACT") for electric generating units on an output basis in pounds of NOx per megawatt hour, adjusted to reflect a simple cycle power plant.

The heat recovery steam generator ("HRSG") found in the Facility is a heat exchanger that recovers heat from a hot gas stream. It produces steam that can be used in a process or used to drive a steam turbine. A common application for an HRSG is in a combined-cycle power station, where hot exhaust from a gas turbine is fed to an HRSG to generate steam which in turn drives a steam turbine. This combination produces electricity in a more thermally efficient manner than either the gas turbine or steam turbine alone.

The Facility's HRSGs consist of three major components: the Evaporator, Superheater, and Economizer. The different components are put together to meet the operating requirements of the unit. Modular HRSGs normally consist of three sections: an LP (low pressure) section, a reheat/IP (intermediate pressure) section, and an HP (high pressure) section. The reheat and IP sections are separate circuits inside the HRSG. The IP steam partly feeds the reheat section. Each section has a steam drum and an evaporator section where water is converted to steam. This steam then passes through superheaters to raise the temperature and pressure past the saturation point.

Item #2 & 4 Steam Turbine and Support Systems Tier IV B-10

40 CFR Part 60 Subparts DA and DB, NOx Limits for Electric Utility Steam Generating Units and Industrial-Commercial-Institutional Steam Generating Units for New Source Performance Standards ("NSPS").

TAC Rule 106.512, Standard Permit for Electric Generating Units (EGU)

NOTE: Permits issued under Texas Clean Air Act's Health & Safety Code Sections 382.011, applies to all electric generating units that emit air contaminants, regardless of size, and it is to reflect Best Available Control Technology ("BACT") for electric generating units on an output basis in pounds of NOx per megawatt hour, adjusted to reflect a simple cycle power plant.

The steam turbine(s) found in the Facility operate on the Rankine cycle in combination with the Brayton cycle, as described above. Steam created in the Facility HRSG(s) from waste heat that would have otherwise been lost to the atmosphere enters the steam turbine via a throttle valve, where it powers the turbine

and connected generator to make electricity. Use of HRSG/Steam Turbine System combination provides the Facility with an overall efficiency of greater than 50%. Steam turbine systems similar to the Facility's have a history of achieving up to 95% availability on an annual basis and can operate for more than a year between shutdown for maintenance and inspections. (5)

Pollution Control Percentage Calculation: Avoided Emissions Approach

To calculate the percentage of the equipment or category deemed to be pollution control equipment, the Avoided Emissions approach has been used. This approach relies on thermal output differences between a conventional power generation system and the combined-cycle system at the Facility. Specifically, the percentage is determined by calculating the displacement of emissions associated with the Facility's thermal output and subtracting these emissions from a baseline emission rate. These displaced emissions are emissions that would have been generated by the same thermal output from a conventional system.

Greater energy efficiency reduces all air contaminant emissions, including the greenhouse gas, carbon dioxide. Higher efficiency processes include combined-cycle operation and combined heat and power ("CHP") generation. For electric generation the energy efficiency of the process expressed in terms of millions of British thermal units ("MMBTU's") per Megawatt-hour. Lower fuel consumption associated with increased fuel conversion efficiency reduces emissions across the board – that is NOx, SOx, particulate matter, hazardous air pollutants, and greenhouse gas emissions such as CO2.

In calculating the percent exempt for the listed items from the ECL-Part B, we utilized Output-Based NOx allocation method for both power generation projects that replaced existing facilities and "Greenfield" power and heat generation facilities. We looked at the various fossil fuel technologies in use today and chose the baseline facility to be a natural gas fuel-fired steam generator. We benchmarked this conventional generation to the subject natural gas-fired combined cycle generator at the Facility. By doing so, we narrowed the heat rate factors as much as possible to be conservative and uniform in modeling. The benchmark heat rate factor is the following:

Natural Gas fuel-fired Steam Generator: 10,490 BTU's/kWh

This baseline heat rate purposely omits other fossil fuel sources in order to eliminate impurity type characteristics, which in turn eliminated the NOx emission and cost of control differences of each fossil fuel and generator type. Comparing the emissions impact of different energy generation facilities is concise when emissions are measured per unit of useful energy output. For the purpose of our calculations, we converted all the energy output to units of MWh (1 MWh = 3.413 MMBTU), and compared the total emission rate to the baseline facility.

The comparison steps to calculate the NOx reduction is as follows:

Calculation (Reference Schedule A)

Step 1 – Subject Output-Based Limit Calculation (lbs NOx / MWh)

(Input-based Limit (lbs NOx/MMBTU)) X (Heat Rate (Btu/kWh)) / (1,000,000 Btu / 1,000 kWh) = Output: (lbs NOx/MWh),

Step 2 – Subject Output Conversion Calculation (NOx Tons / Year)

(Output (lbs NOx/MWh) X (Unit Design Capacity (MW)) X (Capacity Factor) X ((365 Days) X (24 hrs/day)) / 2,000 lbs = Output: (NOx Tons/Year)

Step 3 – Baseline Output-Based Limit Calculation (lbs NOx / MWh)

(Input-based Limit (lbs NOx/MWh)) X (Heat Rate (Btu/kWh)) / (1,000,000 Btu / 1,000 kWh) = Output: (lbs NOx/MWh)

Step 4 – Baseline Output Conversion Calculation (NOx Tons / Year)

(Output (lbs NOx/MMBtu) X (Unit Design Capacity (MW)) X (Capacity Factor) X ((365 Days) X (24 hrs/day)) / 2,000 lbs = Output: (NOx Tons/Year)

Step 5 – Percent NOx Reduction Calculation

$((\text{Output Baseline})_{\text{step 4}} - (\text{Output Subject}))_{\text{step 2}} / (\text{Output Subject})_{\text{step 2}} = \%$ Reduction Output Subject

Step 6 – Percent Exempt Calculation

(Total Subject Facility Cost) X (% NOx Reduction) = Capital Cost of NOx Avoidance

Step 7 – Percent Exempt Calculation

Total Cost of NOx Avoidance / Total Cost of HB 3732 Equipment = % Exempt

- If % Exempt is greater than 100% HB 3732 Equipment is 100% Exempt
- If % Exempt is less than 100% then HB 3732 Equipment is partially exempt at the Step 6 calculation.

NOTE: See the attached calculation sheet for the details regarding Facility-specific calculations and property tax exemption percentage results based upon these calculations.

REFERENCES

1. "Output-Based Regulations: A Handbook for Air Regulators", U.S. Environmental Protection Agency, Office of Atmospheric Programs – Climate Protection Partnerships Division, August, 2004, p.4.

2. "Output-Based Emissions Standards; Advancing Innovative Energy Technologies", Northeast-Midwest Institute; 2003, p. 9.

3. IBID, p.13.

4."Output-Based Regulations: A Handbook for Air Regulators", U.S. Environmental Protection Agency, Office of Atmospheric Programs – Climate Protection Partnerships Division, August, 2004, p.4.

5. http://www.cogeneration.net/Combined_Cycle_Power_Plants.htm

6. "Output-Based Emissions Standards; Advancing Innovative Energy Technologies", Northeast-Midwest Institute; 2003, p. 9.

9. PARTIAL PERCENTAGE CALCULATION

N/A.

10. PROPERTY CATEGORIES AND COSTS

See attached Schedule 10.

11. EMISSION REDUCTION INCENTIVE GRANT

Will an application for an Emission Reduction Incentive Grant be on file for this property/project:

[ ] Yes [X] No

12. APPLICATION DEFICIENCIES

After an initial review of the application, the TCEQ may determine that the information provided with the application is not sufficient to make a use determination. The TCEQ may send a notice of deficiency, requesting additional information that must be provided within 30 days of written notice.

13. FORMAL REQUEST FOR SIGNATURE

By signing this application, you certify that this information is true to the best of your knowledge and belief.

NAME: _____ DATE: 22 Apr 2008

TITLE: Director

COMPANY: Duff and Phelps LLC

Under Texas Penal Code, Section 37.10, if you make a false statement on this application, you could receive a jail term of up to one year and a fine up to $2,000, or a prison term of two to 10 years and a fine of up to $5,000.

14. DELINQUENT FEE/PENALTY PROTOCOL

This form will not be processed until all delinquent fees and/or penalties owed to the TCEQ or the Office of the Attorney General on behalf of the TCEQ are paid in accordance with the Delinquent Fee and Penalty Protocol. (Effective 9/1/2006)

Navasota - Colorado Bend - Phase I
3821 S. State Hwy 60
TCEQ Use Determination Application - 2008
Scheule 10
Tier IV

10. PROPERTY CATEGORIES AND COST

PROPERTY	PROJECT ID. NO.	IN SERVICE DATE	TAXABLE ON OR BEFORE 1/1/94? (Y / N)	TIER IV DECISION FLOW CHART BOX	ECL NUMBER	ESTIMATED PURCHASE COST	% EXEMPT	EXEMPT COST
Heat Recovery Steam Generators (HRSG)	1	2007	N	3	B-8	$ 26,544,805	100%	$ 26,544,805
Steam Turbine System	2	2007	N	3	B-10	$ 10,091,206	100%	$ 10,091,206
					Tier IV Total	$ 36,636,012		$ 36,636,012

Navasota - Colorado Bend - Phase II
3821 S. State Hwy 60
TCEQ Use Determination Application - 2008
Scheule 10
Tier IV

10. PROPERTY CATEGORIES AND COST

PROPERTY	PROJECT ID. NO.	IN SERVICE DATE	TAXABLE ON OR BEFORE 1/1/94? (Y / N)	TIER IV DECISION FLOW CHART BOX	ECL NUMBER	ESTIMATED PURCHASE COST	% EXEMPT	EXEMPT COST
Heat Recovery Steam Generators (HRSG)	3	CWIP	N	3	B-8	$ 30,018,278	100%	$ 30,018,278
Steam Turbine System	4	CWIP	N	3	B-10	$ 22,386,336	100%	$ 22,386,336
					Tier IV Total	$ 52,404,614		$ 52,404,614

52 404 614
36 636 012
89 040 636

Navasota Wharton Energy Partners LP
Colorado Bend Energy Center - Phase I
Schedule A - 2008 Thermal Efficiency Calculation

Subject Details:	
Average Heat Rate [1]	7,746 (Btu/kWh)
NOx Emissions [2]	168.6 Tons / year
Plant Capacity [3]	275 MW
Capacity Factor [4]	100.00%
Technology [5]	Combined Cycle
Total Subject Facility Cost [6]	$169,296,979
Total Cost of Tier IV Equipment [7]	$36,636,012
Baseline Details:	
Average Heat Rate [8]	10,490 Btu/kWh
Technology [9]	Steam Turbine

STEP 1
Subject Output-Based Limit Calculation (lbs NOx / MWh)

Input-based Limit (lbs NOx/MMBtu)	x	Heat Rate (Btu/kWh)	/	Unit Conversions (1,000,000 Btu / 1000 kWh)	=	Output-based Limit (lbs NOx/MWh)
0.0198		7,746		1,000		0.1533

STEP 2
Subject Output Conversion Calculation (NOx Tons / Year)

Output-based Limit (lbs NOx/MWh)	x	Capacity (MW)	x	Capacity Factor	x	Unit Conversions (365 days * 24 Hours / 2,000 lbs)	=	Output NOx (Tons/Year)
0.1533		275		100.00%		4		168.6

STEP 3
Baseline Output-Based Limit Calculation (lbs NOx / MWh)

Input-based Limit (lbs NOx/MMBtu)	x	Heat Rate (Btu/kWh)	/	Unit Conversions (1,000,000 Btu / 1000 kWh)	=	Output-based Limit (lbs NOx/MWh)
0.0198		10,490		1,000		0.2077

STEP 4
Baseline Output Conversion Calculation (NOx Tons / Year)

Output-based Limit (lbs NOx/MWh)	x	Capacity (MW)	x	Capacity Factor	x	Unit Conversions (365 days * 24 Hours / 2,000 lbs)	=	Output NOx (Tons/Year)
0.2077		275		100.00%		4		228.5

STEP 5
Percent NOx Reduction Calculation

(Output Baseline	-	Output Subject)	/	Output Subject	=	% NOx Reduction
228.5		168.6		168.6		35.5%

STEP 6
Percent Exempt Calculation

Total Subject Unit Cost	X	% NOx Reduction	=	Capital Cost of NOx Avoidance
$169,296,979		35.5%		$60,100,428

STEP 7
Percent Exempt Calculation

Total Cost of NOx Avoidance	/	Total Cost of HB 3732 Equipment	=	% Exempt
$60,100,428		$36,636,012		164.0%

Conclude	100%

(1) - Heat rate represents plant performance test heat rate (HHV) and was provided by the client
(2) - NOx emissions is the NOx pollutant emission permit limit in tons per year provided by the client
(3) - Plant capacity is the average nominal capacity and was provided by the client
(4) - Capacity factor is the maximum operating level allowed under the emissions permit provided by the client
(5) - Technology represents the actual technology of the subject
(6) - Total subject facility cost represents the total cost to build the entire facility and it was determined based on data provided by the client
(7) - Total Tier IV equipment was determined by allocating the eligible 1CEQ ECI- part B equipment and their associated cost from actual data provide by the client
(8) - Baseline heat rate was published by the Energy Information Administration ("EIA")
(9) - Baseline technology represents the technology that the subject would have replaced at the time of the subjects construction

Navasota Wharton Energy Partners LP
Colorado Bend Energy Center - Phase II
Schedule A - 2008 Thermal Efficiency Calculation

Subject Details:	
Average Heat Rate [1]	7,746 (Btu/kWh)
NOx Emissions [2]	168.6 Tons / year
Plant Capacity [3]	275 MW
Capacity Factor [4]	100.00%
Technology [5]	Combined Cycle
Total Subject Facility Cost [6]	$162,042,822
Total Cost of Tier IV Equipment [7]	$52,404,614

Baseline Details:	
Average Heat Rate [8]	10,490 Btu/kWh
Technology [9]	Steam Turbine

STEP 1
Subject Output-Based Limit Calculation (lbs NOx / MWh)

Input-based Limit (lbs NOx/MMBtu)		Heat Rate (Btu/kWh)		Unit Conversions (1,000,000 Btu / 1000 kWh)	=	Output-based Limit (lbs NOx/MWh)
0.0198	x	7,746	/	1,000	=	0.1533

STEP 2
Subject Output Conversion Calculation (NOx Tons / Year)

Output-based Limit (lbs NOx/MWh)		Capacity (MW)		Capacity Factor		Unit Conversions (365 days * 24 Hours / 2,000 lbs)	=	Output NOx (Tons/Year)
0.1533	x	275	x	100.00%	x	4	=	168.6

STEP 3
Baseline Output-Based Limit Calculation (lbs NOx / MWh)

Input-based Limit (lbs NOx/MMBtu)		Heat Rate (Btu/kWh)		Unit Conversions (1,000,000 Btu / 1000 kWh)	=	Output-based Limit (lbs NOx/MWh)
0.0198	x	10,490	/	1,000	=	0.2077

STEP 4
Baseline Output Conversion Calculation (NOx Tons / Year)

Output-based Limit (lbs NOx/MWh)		Capacity (MW)		Capacity Factor		Unit Conversions (365 days * 24 Hours / 2,000 lbs)	=	Output NOx (Tons/Year)
0.2077	x	275	x	100.00%	x	4	=	228.5

STEP 5
Percent NOx Reduction Calculation

(Output Baseline		Output Subject)		Output Subject	=	% NOx Reduction
228.5	-	168.6	/	168.6	=	35.5%

STEP 6
Percent Exempt Calculation

Total Subject Unit Cost		% NOx Reduction	=	Capital Cost of NOx Avoidance
$162,042,822	X	35.5%	=	$57,525,202

STEP 7
Percent Exempt Calculation

Total Cost of NOx Avoidance		Total Cost of HB 3732 Equipment	=	% Exempt
$57,525,202	/	$52,404,614	=	109.8%

Conclude	100%

(1) - Heat rate represents the anticipated heat rate (HHV) and was provided by the client
(2) - NOx emissions is the NOx pollutant emission permit limit in tons per year provided by the client
(3) - Plant capacity is the average nominal capacity and was provided by the client
(4) - Capacity factor is the maximum operating level allowed under the emissions permit provided by the client
(5) - Technology represents the actual technology of the subject
(6) - Total subject facility cost represents the total cost to build the entire facility and it was determined based on data provide by the client
(7) - Total Tier IV equipment was determined by allocating the eligible TCEQ ECI, part B equipment and their associated cost from actual data provide by the client
(8) - Baseline heat rate was published by the Energy Information Administration ("EIA")
(9) - Baseline technology represents the technology that the subject would have replaced at the time of the subjects construction

Attachment B

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

USE DETERMINATION

The Texas Commission on Environmental Quality has reviewed Use Determination Application, 07-11926, filed by:

NAVASOTA WHARTON ENERGY PARTNERS LP
COLORADO BEND
3821 S STATE HWY 60
WHARTON TX 77488

The pollution control property/project listed in the Use Determination Application is:

This facility has four thermally efficient heat recovery steam generators (HRSGs) and two steam turbines. This application is a Tier IV application seeking a partial use determination for the HRSGs and the enhanced steam turbines.

The outcome of the review is:

A 100% positive use determination for the four Heat Recovery Steam Generators. This equipment is considered to be pollution control equipment and was installed to meet or exceed federal or state regulations.

A negative determination is issued for the two steam turbines. The use of the steam turbines does not provide an environmental benefit at the site. The steam turbines are not considered to be pollution control equipment.

Executive Director

May 1 2008
Date

TAX RELIEF FOR POLLUTION CONTROL PROPERTY: TECHNICAL REVIEW DOCUMENT

Reviewed By: RLH App. No.: 07 - 11926 Review Start Date: 4/8/2008

Company Name: NAVASOTA WHARTON ENERGY PARTNERS LP
Facility Name: COLORADO BEND
County: WHARTON Outstanding Fees: N
Batch/Voucher Number:B500028

ADMINISTRATIVE REVIEW

Administrative Complete Date:4/8/2008

TIER LEVEL
What Tier is this application? The application was filed as a Tier IV application. Is this the appropriate level?

The property listed on this application, Heat Recovery Steam Generators and a steam turbine are items B8 and B10 on the Equipment and Categories List. This application was filed as a Tier IV. Tier IV is the appropriate level for this application.

RELEVANT RULE, REGULATION, OR STATUTORY PROVISION
The rule listed in the application is: 40 CFR 60.44Da
The appropriate rule is: 40 CFR 60.44Da

Explain why this is the appropriate rule?

40 CFR 60.Subpart DA: Standards of Performance for New Stationary Sources. Standards of performance for Electric Utility Steam Generating Units for Which Construction is Commenced after September 18, 1978. This is an appropriate rule.

BRIEF DESCRIPTION OF PROPERTY
The property is described as:

This facility has four thermally efficient heat recovery steam generators (HRSGs) and two steam turbines. This application is a Tier IV application seeking a partial use determination for the HRSGs and the enhanced steam turbines.

Is an adequate description and purpose of the property provided? Does it list the anticipated environmental benefits? Are sketches and flow diagrams provided if needed?

An adequate description of the property was provided, and the purpose of the property was listed. The anticipated environmental benefit is listed. Sketches and flow diagrams were provided.

DECISION FLOWCHART(30 TAC 17.15(a))
Mark the appropriate boxes: Box 3 Box 5 Box 6(IV) Y Box 10(III) Box 12(I) Box 13(II)
PART B DECISION FLOWCHART (17.15(b))
Mark the appropriate boxes: Box 1Y Box 2 Y Box 3 Y

Describe how the property flowed through the Decision Flowchart:

The Heat Recovery Steam Generators (HRSGs) are listed on Part B of the Equipment & Categories List as item B-8. As Part B equipment the HRSGs leave the Decision Flow Chart at Box 6 and pass through Box 1 of the Part B Decision Flow Chart with a yes answer. Since the use

of HRSGs provide an environmental benefit of reduced NOx emissions at the site there is a yes answer for Box 2. Since there is a reduction in NOx emissions there is an environmental rule which is being met, so there is a yes answer to Box 3. The steam turbine passes through Box 1 on the Part B Decision Flow Chart with a yes answer. Since the use of the steam turbine does not provide an environmental benefit at the site a no answer is the result of Box 2. The steam turbine is not eligible for a positive determination.

TIER III or IV APPLICATIONS

Does your calculation agree with the applicants?

No. The application contains a proposed formula for calculating the pollution control value of the HRSGs and the steam turbine. The formula is outcome determinative, and its focus is not on the pollution control aspect of the property. The Executive Director disagrees with this formula.

PROPERTY CATEGORIES AND COSTS

Is the table completed correctly? Has the applicant certified that all listed property became taxable for the first time after January 1, 1994? Is all information necessary for conducting the technical review included.

The table was completed correctly. The applicant certified that all listed property became taxable for the first time after January 1, 1994. All the information necessary for conducting the technical review was included on the application.

TECHNICAL DEFICIENCIES

Is the application complete as received: Y If the application was not administratively complete explain below when justifying the final decision in the final determination section. If the application was not technically complete then:

Provide the language to be used in the Notice of Deficiency (NOD) letter:

Summarize the NOD response:

Provide the language used in the second NOD letter:

Summarize the second NOD response:

Provide the language used in the thied NOD letter:

Summarize the third NOD response:

FINAL DETERMINATION

If the property description has been summarized enter the detailed property description:

This facility has four thermally efficient heat recovery steam generators (HRSGs) and two steam

turbines. This application is a Tier IV application seeking a partial use determination for the HRSGs and the enhanced steam turbines.

Provide the reason for your final determination:

The Heat Recovery Steam Generators meet all of the requirements of Chapter 17. A positive use determination based on the most appropriate formula should be issued for the Heat Recovery Steam Generators. The most appropriate formula has been determined by the Executive Director. A negative determination should be issued for the steam turbine. The use of the steam turbine does not result in there being an environmental benefit at the site.

Provide the language for the final determination.

A positive use determination of 100% for the four Heat Recovery Steam Generators. A negative determination is issued for the steam turbine. The use of the steam turbine does not provide an environmental benefit at the site. The steam turbine is not considered to be pollution control equipment.

Highlight the required signatures and establish the appropriate due dates.

Reviewed: [signature] **Date Signed:** 5/1/08

Peer Reviewed: [signature] **Date Signed:** 5-1-08

Team Leader: [signature] **Date Signed:** 5/1/08

Section Manager: [signature] **Date Signed:** MAY 1 2008

Division Director: [signature] **Date Signed:** MAY 1 2008

Attachment C

WHARTON COUNTY
APPRAISAL DISTRICT
2407 1/2 N. Richmond Road
Wharton, Texas 77488

Phone: 979-532-8931
Fax: 979-532-5691

May 19, 2008

Office of the Chief Clerk - MC 105
Texas Commission on Environmental Quality
PO Box 13087
Austin, TX. 78711-3087

Re: TCEQ Use Determination No. **07-11926**

Dear Ms. Castañuela,

I am writing this letter as an official appeal of the TCEQ's property tax Pollution Control Exemption Use Determination with the tracking number **07-11926** filed by **Navasota Wharton energy Partners I** for the **Colorado Bend Power Generation** facility. We believe that the Heat Recovery Steam Generators described in this application are production equipment in that they burn natural gas to create steam to generate electricity. This creates pollutants, not reduces them.

Secondly, the pollution control components associated with the HRSG's that do reduce pollution have already been exempted under Use Determination 07-11925. Therefore, this second exemption of the entire HRSG only serves to exempt the non-pollution control components of the units.

I respectfully request that our appeal regarding this Use Determination be granted and the exemption be denied.

Hugh L. Landrum & Associates, Inc. will be acting as our agent in this matter.

Thank you for your time and consideration.

Sincerely,

Tylene Gamble
Chief Appraiser
Wharton County Appraisal District

Attachment D

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

February 23, 2009

LaDonna Castañuela, Chief Clerk
TCEQ Office of Chief Clerk MC-105
P.O. Box 13087
Austin, Texas 78711-3087.

Re: TCEQ Docket Nos. 2008-0830-MIS-U (UD No. 07-11914/Tenaska Gateway Partners, Ltd.— Rusk County Appraisal District), 2008-0831-MIS-U (UD No. 07-11966/Freestone Power Generation, L.P.— Freestone Central Appraisal District), 2008-0832-MIS-U (UD No. 07-11971/Borger Energy Associates, L.P.— Hutchinson County Appraisal District), 2008-0849-MIS-U (UD No. 07-11969/ Brazos Valley Energy, L.P.— Fort Bend Central Appraisal District), 2008-0850-MIS-U (UD No. 07-11994/Freeport Energy Center, L.P.— Brazoria County Appraisal District), 2008-0851-MIS-U (UD No. 07-11926/Navasota Wharton Energy Partners, L.P.— Wharton County Appraisal District).
Executive Director's Motion for Continuance

Dear Ms. Castañuela:

Enclosed for filing, please find a copy of the *"Executive Director's Motion for Continuance"* regarding the above referenced use determination appeals. If you have any questions, please do not hesitate to contact me at (512) 239-0969.

Sincerely,

Timothy J. Reidy
Staff Attorney
Environmental Law Division

TCEQ Docket Numbers
2008-0830-MIS-U (UD 07-11914/Tenaska Gateway Partners, Ltd. – Rusk County)
2008-0831-MIS-U (UD 07-11966/Freestone Power Generation, L.P. – Freestone County)
2008-0832-MIS-U (UD 07-11971/Borger Energy Associates, L.P. – Hutchinson County)
2008-0849-MIS-U (UD 07-11969/Brazos Valley Energy, L.P. – Fort Bend County)
2008-0850-MIS-U (UD 07-11994/Freeport Energy Center, L.P. – Brazoria County)
2008-0851-MIS-U (UD 07-11926/Navasota Wharton Energy Partners, L.P. – Wharton County)

APPEAL OF THE EXECUTIVE DIRECTOR'S USE DETERMINATIONS ISSUED TO TENASKA GATEWAY PARTNERS, LTD.; FREESTONE POWER GENERATION, L.P.; BORGER ENERGY ASSOCIATES, L.P.; BRAZOS VALLEY ENERGY, L.P.; FREEPORT ENERGY CENTER, L.P.; and NAVASOTA WHARTON ENERGY PARTNERS, L.P.	§	BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

2009 FEB 23 PM 3:35
CHIEF CLERKS OFFICE
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

EXECUTIVE DIRECTOR'S MOTION FOR CONTINUANCE

TO THE GENERAL COUNSEL OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

The Commission is scheduled to consider the above referenced use determination appeals at its February 25, 2009 agenda meeting. The Executive Director respectfully requests that, pursuant to Section 10.4(b) of Title 30 of the Texas Administrative Code, the Commission continue its consideration of these matters to allow the Executive Director more time to evaluate its current recommendation. The Executive Director has conferred with all parties, and none of the parties oppose this motion.

Respectfully submitted,
Texas Commission on Environmental Quality

Mark R. Vickery, P.G.
Executive Director

Robert Martinez, Director
Environmental Law Division

By Tim Reidy
Timothy J. Reidy, Staff Attorney
Environmental Law Division

State Bar No. 24058069
P.O. Box 13087, MC 173
Austin, Texas 78711-3087
(512) 239-0969
REPRESENTING THE EXECUTIVE DIRECTOR OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CERTIFICATE OF SERVICE

I certify that on February 23, 2009, a copy of the "Executive Director's Motion for Continuance" was filed with the Texas Commission on Environmental Quality's Office of the Chief Clerk, and was sent by hand delivery, first-class mail, or facsimile to all persons on the attached mailing list.

Timothy J. Reidy, Staff Attorney
Environmental Law Division
State Bar No. 24058069

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
2009 FEB 23 PM 3:35
CHIEF CLERKS OFFICE

Les Trobman
General Counsel
Texas Commission on Environmental Quality
Office of General Counsel
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Pritchard & Abbott, Inc.
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Hugh L. Landrum & Associates
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Minor Hibbs

TCEQ Chief Engineers Office (MC 168)
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512/239-6590 Fax 512-239-1794

Attachment E

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

February 23, 2009

To: Persons on the attached Mailing List (By mail, and facsimile as indicated)

Re: Appeals of the Executive Director's Use Determinations regarding Tenaska Gateway Partners, Ltd. (Rusk County), Freestone Power Generation LP (Freestone County), Borger Energy Associates, LP (Hutchinson County), Brazos Valley Energy L.P. (Fort Bend County), Freeport Energy Center, L.P. (Brazoria County), and Navasota Wharton Energy Partners LP (Wharton County), TCEQ Use Determination Nos. 07-11914, 07-11966, 07-11971, 07-11969, 07-11994 and 07-11926; TCEQ Docket Nos. 2008-0830-MIS-U, 2008-0831-MIS-U, 2008-0832-MIS-U, 2008-0849-MIS-U, 2008-0850-MIS-U, and 2008-0851-MIS-U

The above-named matters are currently scheduled to be considered by the Texas Commission on Environmental Quality ("TCEQ") at its February 25, 2009, public meeting. The TCEQ Executive Director (ED) filed a *Motion for Continuance* (ED's Motion) on February 23, 2009. The ED's Motion asks that the Commission continue its consideration of these above-named matters to allow the ED more time to evaluate its current recommendation. The ED states that none of the parties oppose the ED's Motion.

Pursuant to the ED's Motion, the Office of General Counsel has determined to continue the matter from the February 25, 2009 meeting. Accordingly, this matter is continued indefinitely pursuant to 30 TAC § 10.4. The Office of General Counsel will notify the parties by subsequent letter of the future agenda setting and any associated filing deadlines.

If you have any questions regarding this matter, please contact John Sedberry, Assistant General Counsel, at 512-239-6575.

Respectfully,

Les Trobman
General Counsel

Mailing List

Mailing List

Tenaska Gateway Partners, Ltd. (Rusk County), Freestone Power Generation LP (Freestone County), Borger Energy Associates, LP (Hutchinson County), Brazos Valley Energy L.P. (Fort Bend County), Freeport Energy Center, L.P. (Brazoria County), and Navasota Wharton Energy Partners LP (Wharton County) TCEQ Docket Nos. 2008-0830-MIS-U, 2008-0831-MIS-U, 2008-0832-MIS-U, 2008-0849-MIS-U, 2008-0850-MIS-U, and 2008-0851-MIS-U

Diana Hooks, RPA/RTA
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402/691-9500 FAX 402/691-9526

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Bridget Bohac
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David S. Schanbacher
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512/239-6590 FAX 512/239-1794

Attachment F

TCEQ Docket Numbers
2008-0830-MIS-U (UD 07-11914/Tenaska Gateway Partners, Ltd – Rusk County)
2008-0831-MIS-U (UD 07-11966/Freestone Power Generation, L.P. – Freestone County)
2008-0832-MIS-U (UD 07-11971/Borger Energy Associates, L.P. – Hutchinson County)
2008-0849-MIS-U (UD 07-11969/Brazos Valley Energy, L.P. – Fort Bend County)
2008-0850-MIS-U (UD 07-11994/Freeport Energy Center, L.P. – Brazoria County)
2008-0851-MIS-U (UD 07-11926/Navasota Wharton Energy Partners, L.P. – Wharton County)

Appeal of Executive Director's Use Determination Issue to	§	Before the
Tenaska Gateway Partners, Ltd;	§	
Freestone Power Generation, L.P.;	§	Texas Commission
Borger Energy Associates, L.P.;	§	
Brazos Valley Energy, L.P.;	§	on
Freeport Energy Center, L.P.; and	§	
Navasota Wharton Energy Partners, L.P	§	Environmental Quality

Executive Director's Request for Remand of Applications Submitted by Tenaska Gateway Partners, Ltd; Freestone Power Generation, L.P.; Borger Energy Associates, L.P.; Brazos Valley Energy, L.P.; Freeport Energy Center, L.P.; and Navasota Wharton Energy Partners, L.P.

Pursuant to 30 TAC § 17.25(d), the Executive Director of the Texas Commission on Environmental Quality requests that the General Council remand the above listed applications for further processing.

Respectfully submitted,

Texas Commission on Environmental Quality

Zak Covar
Executive Director

Caroline Sweeney, Deputy Director
Office of Legal Services

Robert Martinez, Director
Environmental Law Division

Daniel Long

Daniel Long, Staff Attorney
Environmental Law Division
State Bar No. 24032679
P.O. Box 13087, MC 173
Austin, Texas 78711-3087
(512) 239-5373
(512) 239-0606

CERTIFICATE OF SERVICE

I certify that on June 18, 2012, the original and 7 copies of the Executive Director's Request for Remand of Applications Submitted by Tenaska Gateway Partners, Ltd; Freestone Power Generation, L.P.; Borger Energy Associates, L.P.; Brazos Valley Energy, L.P.; Freeport Energy Center, L.P.; and Navasota Wharton Energy Partners, L.P. was filed with the Office of the Chief Clerk, Texas Commission on Environmental Quality, and was served by first-class mail, agency mail, electronic mail, or facsimile to all persons on the attached mailing list.

Daniel Long

Daniel Long, Staff Attorney
Environmental Law Division
Texas Commission on Environmental Quality

Mailing List
TCEQ Docket Numbers
2008-0830-MIS-U (UD 07-11914/Tenaska Gateway Partners, Ltd – Rusk County)
2008-0831-MIS-U (UD 07-11966/Freestone Power Generation, L.P. – Freestone County)
2008-0832-MIS-U (UD 07-11971/Borger Energy Associates, L.P. – Hutchinson County)
2008-0849-MIS-U (UD 07-11969/Brazos Valley Energy, L.P. – Fort Bend County)
2008-0850-MIS-U (UD 07-11994/Freeport Energy Center, L.P. – Brazoria County)
2008-0851-MIS-U (UD 07-11926/Navasota Wharton Energy Partners, L.P. – Wharton County)

Appraisal Districts

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Pritchard & Abbott, Inc.
Attn: Mr. C. Wayne Frazell
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Fort Worth, Texas 76132-3687
817/926-7861 Fax 817/927-5314
wfrazell@pandai.com

Applicants:

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Borger Energy Associates, L.P.
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North Richland Hills, Texas 76180

Brazos Valley Energy, L.P.
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Houston, Texas 77002

Freeport Energy Center, L.P.
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Pasadena, Texas 77507

Navasota Wharton Energy Partners LP
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Magnolia, Texas 77354

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Dennis Deegear
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Hugh L. Landrum & Associates
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Commission:

Blas Coy
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TCEQ Office of the Chief Clerk (MC 105)
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Attachment G

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

June 29, 2012

To: Persons on the attached service list (by mail and facsimile as indicated)

Re: Request for remand of Prop 2 Use Determination Application Nos. 07-11914, 07-11966, 07-11971, 07-11969, 07-11994, and 07-11926 submitted under TCEQ Docket Nos. 2008-0830-MIS-U; 2008-0831-MIS-U; 2008-0832-MIS-U; 2008-0849-MIS-U; 2008-0850-MIS-U; and 2008-0851-MIS-U.

On June 18, 2012, the Executive Director (ED) filed a request (served on each of the parties for the respective use determination appeals) under 30 TAC § 17.25(d) for remand of the following use determination applications for further processing:

- Application No. 07-11914, Tenaska Gateway Partners, Ltd, Rusk County (TCEQ Docket No. 2008-0830-MIS-U);
- Application No. 07-11966, Freestone Power Generation, L.P., Freestone County (TCEQ Docket No. 2008-0831-MIS-U);
- Application No. 07-11971, Borger Energy Associates, L.P., Hutchinson County (TCEQ Docket No. 2008-0832-MIS-U);
- Application No. 07-11969, Brazos Valley Energy Center, L.P., Fort Bend County (TCEQ Docket No. 2008-0849-MIS-U);
- Application No. 07-11994, Freeport Energy Center, L.P., Brazoria County (TCEQ Docket No. 2008-0850-MIS-U); and
- Application No. 07-11926, Navasota Wharton Energy Partners, L.P., Wharton County (TCEQ Docket No. 2008-0851-MIS-U).

Section 17.25(d) provides that "the general counsel may remand a matter from the commission's agenda to the executive director if the executive director ... requests a remand." Pursuant to 30 TAC § 17.25(d), this letter grants the ED's request to remand the above-listed applications to the ED for further processing. The General Counsel notes that any revised use determination that may subsequently be issued by the ED will be subject to the appeals process set forth in § 17.25 of the Commission's rules.

If you have any questions about this matter, please contact Jim Rizk, Assistant General Counsel, at 512/239-5530.

Very truly yours,

Les Trobman
General Counsel

Mailing List

Mailing List
Prop 2 Use Determination Application
Nos. 07-11914, 07-11966, 07-11971, 07-11969, 07-11994, and 07-11926
TCEQ Docket Nos. 2008-0830-MIS-U; 2008-0831-MIS-U; 2008-0832-MIS-U;
2008-0849-MIS-U; 2008-0850-MIS-U; and 2008-0851-MIS-U

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Chance Goodin
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Blas Coy
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512/239-6363 FAX 512/239-6377

Docket Clerk
TCEQ Office of Chief Clerk MC 105
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Attachment H

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

July 10, 2012

Mr. Greg Maxim
Director
Duff and Phelps, LLC
919 Congress Ave Ste 1450
Austin, Texas 78701

Re: Notice of Negative Use Determination
Navasota Wharton Energy Partners, LP
Colorado Bend Energy Center
3821 S. State Hwy 60
Wharton (Wharton County)
Application Number: 07-11926; Tracking Number: DPCOBendB

Dear Mr. Maxim:

This letter responds to Navasota Wharton Energy Partners, LP's Application for Use Determination for the Colorado Bend Energy Center, remanded to the executive director on June 29, 2012, pursuant to the Texas Commission on Environmental Quality's (TCEQ) Tax Relief for Pollution Control Property Program

The TCEQ has completed the review for application #07-11926 and has issued a Negative Use Determination for the property in accordance with Title 30 Texas Administrative Code (TAC) §17.4 and §17.6. Heat recovery steam generators are used solely for production and, therefore, are not eligible for a positive use determination.

Please be advised that a Negative Use Determination may be appealed. The appeal must be filed with the TCEQ Chief Clerk within 20 days after the receipt of this letter in accordance with 30 TAC §17.25.

If you have questions regarding this letter or need further assistance, please contact Ronald Hatlett of the Tax Relief for Pollution Control Property Program by telephone at (512) 239-6348, by e-mail at ronald.hatlett@tceq.texas.gov, or write to the Texas Commission on Environmental Quality, Tax Relief for Pollution Control Property Program, MC-110, P.O. Box 13087, Austin, Texas 78711-3087.

Sincerely,

Chance Goodin, Team Leader
Stationary Source Programs
Air Quality Division

CG/RH

cc: Chief Appraiser, Wharton County Appraisal District, 308 E. Milam St., Wharton, Texas 77488-4918

Attachment J

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

July 10, 2012

Mr. Greg Maxim
Director
Duff and Phelps, LLC
919 Congress Ave Ste 1450
Austin, Texas 78701

Re: Notice of Negative Use Determination
Navasota Wharton Energy Partners, LP
Colorado Bend Energy Center
3821 S. State Hwy 60
Wharton (Wharton County)
Application Number: 07-11926; Tracking Number: DPCOBendB

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Sincerely,

cgoodin

Chance Goodin, Team Leader
Stationary Source Programs
Air Quality Division

CG/RH

cc: Chief Appraiser, Wharton County Appraisal District, 308 E. Milam St., Wharton, Texas 77488-4918

Attachment K

Pre-Repowering Efficiency and Air Emissions Unit 1

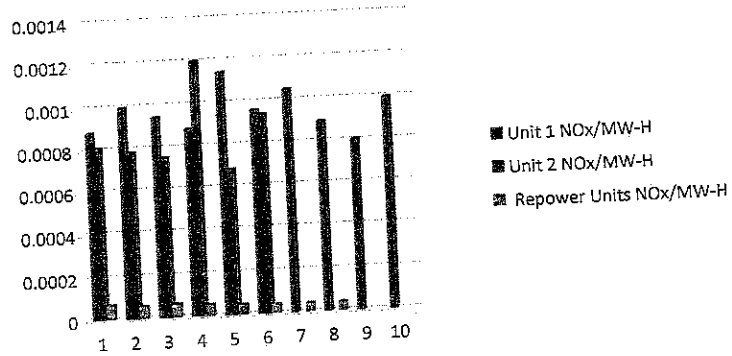
FACILITY_NAME	UNITID	OP_YEAR	HEAT_INPUT	NOX_RATE lbs/MMBTU	NOX_MASS TONs	Gross Load (MW-H)	CO2 Tons	Operating Hours	NOX TONS/MW-HR
Barney M. Davis	1	2003	9,882,095	0.14	814.4	923,389	611,010.3	8,398	0.0009
Barney M. Davis	1	2004	1,365,091	0.1	115.4	115,931	81,133.3	1,273	0.0010
Barney M. Davis	1	2005	4,018,371	0.13	343.1	363,700	238,809.6	3,423	0.0009
Barney M. Davis	1	2006	3,861,536	0.12	319.8	361,211	229,487.0	2,820	0.0009
Barney M. Davis	1	2007	1,815,633	0.15	198.3	173,553	107,904.3	1,658	0.0011
Barney M. Davis	1	2008	4,749,542	0.13	420.8	436,979	282,257.8	3,852	0.0010
Barney M. Davis	1	2009	3,199,412	0.15	332.1	315,615	190,145.3	2,112	0.0011
Barney M. Davis	1	2010	660,763	0.1	48.3	53,988	39,255.9	843	0.0009
Barney M. Davis	1	2011	1,906,567	0.1	131	162,795	113,303.8	1,761	0.0008
Barney M. Davis	1	2012	1,674,769	0.012	138.1	138,581	99,528.2	1,494	0.0010

Pre-Repowering Efficiency and Air Emissions Unit 2

FACILITY_NAME	UNITID	OP_YEAR	HEAT_INPUT	NOX_RATE lbs/MMBTU	NOX_MASS TONs	Gross Load (MW-H)	CO2 Tons	Operating Hours	NOX TONS/MW-HR
Barney M. Davis	2	2003	2,094,717	0.1	152.7	189,000	131,053.6	1,606	0.0008
Barney M. Davis	2	2004	11,922,584	0.12	837.6	1,070,886	708,543.8	7,750	0.0008
Barney M. Davis	2	2005	6,256,894	0.11	388.7	516,358	371,836.8	5,580	0.0008
Barney M. Davis	2	2006	2,965,995	0.15	280.5	233,671	176,265.6	1,763	0.0012
Barney M. Davis	2	2007	1,339,322	0.09	82.8	120,870	79,592.2	1,060	0.0007
Barney M. Davis	2	2008	3,419,274	0.15	294.4	312,553	203,201.2	2,679	0.0009

Post-Repowering Efficiency and Air Emissions BMD Units 3, 4 & NB Units 8, 9

FACILITY_NAME	UNITID	OP_YEAR	HEAT_INPUT	NOX_RATE lbs/MMBTU	NOX_MASS TONs	Gross Load (MW-H)	CO2 Tons	Operating Hours	NOX TONS/MW-HR
Barney M. Davis	3	2011	8,264,568	0.03	73.3	1,064,646	491,149.8	5637	0.0001
Barney M. Davis	3	2012	5,289,883	0.02	40.1	687,398	314,371.3	3524	0.0001
Barney M. Davis	4	2011	8,092,698	0.03	68.9	1,081,929	480,942.4	5742	0.0001
Barney M. Davis	4	2012	4,943,162	0.02	36.3	663,495	293,764.0	3425	0.0001
Nueces Bay	8	2011	7,989,948	0.02	52.7	1,093,549	474,830.6	5692	0.0000
Nueces Bay	8	2012	5,011,986	0.02	30	687,430	297,856.4	3517	0.0000
Nueces Bay	9	2011	7,978,245	0.02	45.5	1,092,722	474,132.6	5558	0.0000
Nueces Bay	9	2012	5,117,020	0.02	29.5	698,703	304,095.0	3545	0.0000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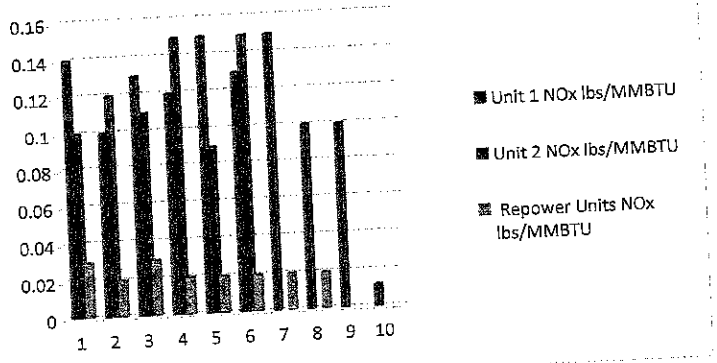
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Unit 2 NOx lbs/MMBTU
Repower Units NOx lbs/MMBTU